Submitted by P. in E. Judge Davis
Argued by Duncan 2-480
for Deft in Error
Dec. 1. 75
Affirmed

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~272~~ Co

JOHN H. KENNARD, PLAINTIFF IN ERROR,

vs.

THE STATE OF LOUISIANA, EX REL., PHILIP HICKEY MORGAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED OCTOBER 17, 1873.

In Custus
to Curia
Affirmed

SUPREME COURT OF THE UNITED STATES.

No. 272.

JOHN H. KENNARD, PLAINTIFF IN ERROR,

vs.

THE STATE OF LOUISIANA, EX REL., PHILIP HICKEY MORGAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

INDEX.

	Original.	Print.
Amended and supplemental answer and prayer for jury	7	2
Appeal-bond	36	18
Affidavit, suit No. 18	48	20
Answer to rule nisi in suit No. 18:	57	23
Affidavit in suit No. 18	89	30
Bill of exceptions	31	17
Bond of appeal	36	18
In suit No. 18:		
Bond of appeal	90	31
Bond of appeal	100	33
Clerk's certificate	106	34
In suit No. 18:		
Citation	44	19
Citation and supplemental petition	53	22
Cont of rule	55	22
Continuance	59	23
Document No. 1	13	4
2	15	4
3	16	5
4	18	5
5	20	6
8	21	14
9	23	15
10	24	15
11	26	16
12	28	16
13	30	16
Exception	3	1
Exception and answer	4	1
Exception overruled	6	2

	Original.	Print.
In suit No. 18:		
Exception	82	29
Judgment	24	15
Judgment in suit No. 18	93	31
Motion and order	1	1
Motion and order for appeal	35	18
Suit No. 18:		
Motion and order to dismiss	80	28
Motion for new trial	80	28
Motion and order dismissing suit	86	30
Motion for appeal	99	33
Note evidence	9	3
Order	9	3
Suit No. 18:		
Order	49	21
Opinion of court on rule nisi	60	24
Order	89	31
Suit No. 18:		
Petition	41	18
Petition of intervention and appeal	87	30
Petition of intervention	95	32
Suit No. 18:		
Rules nisi	50	21
Rule absolute	76	27
Rule continued	83	29
Rule submitted	83	29
Rule absolute	84	29
Reasons for granting new trial	85	29
Suit No. 18:		
Sheriff's return, petition, and citation	45	19
Sheriff's return	52	21
do.	54	22
do.	79	28
do.	81	28
Supplemental petition, &c	46	20
Writs of injunction	77	27
PROCEEDINGS IN THE SUPREME COURT.		
Extract from the minutes	107	35
Motion to fix	107	34
Notice of trial	107	35
Sheriff's return	108	35
Extract from the minutes	108	35
Case submitted	108	35
Extract from the minutes, (decree)	109	36
Opinion of the court	110	36
Concurring opinion of Mr. Justice Howell	130	41
Dissenting opinion of Mr. Justice Wyly	134	42
Certificate of the clerk	153	47
Writ of error	155	48
Affidavit of J. H. Kennard	156	48
Writ of error	157	49
Writ of error	159	51
Bond	161	52
Citation and service	162	53

1 Superior district court for the parish of Orleans.

STATE OF LA. EX REL. P. H. MORGAN
vs.
JOHN H. KENNARD. } No. 604.

Motion and order.—Filed Jany. 16th, 1873.

On motion of A. P. Field, attorney-general of the State of Louisiana, herein appearing upon the relation of Philip Hickey Morgan, a resident of the parish of Orleans, and upon suggesting and giving the court to understand and be informed, as follows, viz:

That said P. H. Morgan was nominated by the acting governor
2 of the State to the senate thereof to fill the office of associate justice of the supreme court of the State of Louisiana; that his said nomination was duly confirmed; that he was commissioned thereto on the 4th January, 1873; that he has taken and subscribed the oath required by law; that he is entitled and empowered to execute and fulfill the duties of said office according to law, and to have and to hold said office, with all the powers, privileges, and emoluments thereof;

And on further suggesting that John H. Kennard, also a resident of said parish, unlawfully holds said office, and executes the duties thereof, and claims the right to the said office and to the powers, privileges, and emoluments thereof:

It is ordered, that said John H. Kennard show cause, on Saturday, January 18th, 1873, at 11 o'clock a. m., why it should not be forthwith decreed and adjudged that he is unlawfully holding and exercis-
3 ing the duties of said office of associate justice of the supreme court of the State of Louisiana, and the said P. H. Morgan be decreed and adjudged entitled thereto.

Exception.—Filed Jany. 18th, 1873.

Superior district court for the parish of Orleans.

STATE OF LA. ON THE RELATION OF P. H. Morgan
vs.
JOHN H. KENNARD. } No. 604.

And now comes John H. Kennard and excepts that there has been no citation issued herein or served on him in this case, and prays to be hence dismissed, with costs.

(Signed) SEMMES & MOTT.
(do.) J. A. CAMPBELL.
(do.) W. W. HOWE.

4 *Exception and answer.—Filed Jany. 18th, 1873.*

Superior district court for the parish of Orleans.

STATE OF LA. EX REL. P. H. MORGAN
vs.
JOHN H. KENNARD. } No. 604.

Now comes Jno. H. Kennard, defendant in this suit, and excepts to the rule herein taken by A. P. Field, attorney-general, on relation of P. H. Morgan, on the ground that said proceeding by rule, in manner and

form as set forth in said rule, is not authorized by law; and further, that the act of 15th Jany., 1873, entitled "An act to regulate proceedings in contestations between persons claiming a judicial office," as to its first section, is unconstitutional and void, not being in conformity to the title of said act; and further, that said act is prospective,
5 and does not apply to pending litigation; and further, that said act in relation to section' two and three is unconstitutional, as it authorizes proceedings which amount to a denial of justice; and further, that if said act is to be construed as applicable to suits instituted prior to its passage, it is retroactive and void, as violative of article 110 of the constitution.

In case these exceptions be overruled, and not otherwise, for answer to said rule, this respondent avers that he was duly appointed by the governor of this State to the office of associate justice of the supreme court of the State of Louisiana, on 3rd December, 1872, vice W. W. Howe, resigned, during the recess of the senate; and that on the same day he was duly qualified and took possession of said office, hav-
6 ing complied with all legal requirements, and his term of office has not yet expired.

(Signed) SEMMES & MOTT.
(do.) JNO. A. CAMPBELL,
Of Counsel.
(do.) W. W. HOWE,
Of Counsel.

Exceptions overruled.—Minutes Jany. 18th, 1873.

Present: The honorable Jacob Hawkins, judge.

STATE OF LA. EX REL. P. H. MORGAN *vs.* JOHN H. KENNARD. } No. 604.

The rule herein taken on defendant came on for trial, whereupon defendant files exceptions to this proceeding, and the exceptions came on for trial.

Present: Semmes & Mott, & Howe and Prentiss, for defendant and exceptor.

7 Present: W. H. Hunt, and A. P. Field, attorney-general, for defendant in exception.

When, after hearing pleadings and counsel, the court, considering the law and the evidence to be in favor of the defendant in exception, the plaintiff in suit,

It is ordered by the court that the exceptions herein filed be overruled. It is further ordered that the rule herein fixed for this day be continued to Monday, January 20th, 1873, at 11 o'clock a. m.

Amended and supplemental answer and prayer for jury.—Filed Jany. 20th, 1873.

Superior district court for the parish of Orleans.

STATE OF LA. EX REL. P. H. MORGAN *vs.* J. H. KENNARD. } No. 604.

8 Now comes J. H. Kennard, and for further answer prays for a trial by jury, and pleads that the said act of the legislature under which the relator, P. H. Morgan, claims to proceed is null and void, as violative of section one, article fourteen, of the Constitution of the United States, which forbids any State from making any

law which shall abridge the privileges or immunities of its citizens, and prohibits any State from depriving any person of life, liberty, or property without due process of law, or to deny to any person within its jurisdiction the equal protection of its laws; and if said act is void, this court has no jurisdiction to proceed by rule in the manner and form as set forth in said rule.

(Signed) SEMMES & MOTT.
(Signed) J. A. CAMPBELL.
(Signed) W. W. HOWE.

9 *Order.*

On presentation of the foregoing in open court—

It is ordered by the court, that the prayer for trial by jury in the within answer be refused.

New Orleans, January 20th, 1873.

(Signed) JACOB HAWKINS, *Judge.*

Note of evidence.—Filed Jany. 20th, 1873.

Superior district court for the parish of Orleans.

STATE OF LA. EX REL. P. H. MORGAN
vs.
JOHN H. KENNARD. } No. 604.

Plaintiff offers in evidence the commission of P. H. Morgan, under the seal of the State, dated January 4th, 1873, and signed by P. B. S.
10 Pinchback, acting governor, now filed and marked "Document No. 1." Also, oath of office, attached to said commission, dated 13th January, 1873.

Also, oath of office, marked "Document No. 2," now filed.

Also, extract from the minutes of the executive session of the senate of the State of Louisiana on the 4th of January, 1873. (Document No. 3.)

Objected to as irrelevant, and not shown to be connected with the particular commission filed.

Objection overruled as going merely to the effect of the evidence.

Counsel for defendant reserves his right to file bill of exception to this ruling.

Plaintiff offers in evidence, also, certified copy-list of the senators returned elected, holding over, or seated by the senate, duly and legally acting as senators of the State of Louisiana on the 4th of
11 January, 1873. (Document No. 4.)

Objected to. Objection overruled.

Also, promulgation of senators elected by the returning-board, (Document No. 5,) as published in the official journal on December 9th, 1872.

Objected to. Objection overruled.

Also, promulgation of the election of the judges of the different district courts of the State by the returning-board, (Document No. 6,) appearing in the official journal. Copy to be furnished.

Also, record of suit No. 13,545 of the docket of the eighth district court.

(Document No. 7.) (Transcript of record on file in supreme court.)

Objected to. Objection overruled.

Also, proclamation of the governor calling an extra session of
12 the legislature, (Document No. 8;) also, Document No. 9 and Document No. 10.

Defendant offers in evidence the commission of J. H. Kennard, (Document No. 11.)

Also, oath of office of J. H. Kennard, (Document No. 12.)

Also, certificate that this oath has been filed in the office of the secretary of state, (Document No. 13.)

It is agreed that the pleadings, plaintiff's petition, the exceptions, and the answer of defendant, the bills of exception, and the motion for appeal shall be copied in the transcript of appeal, and all other documents shall go up in original form.

13 *Document No.* 1.—*Filed January 20th*, 1873, *and offered in evidence by* .

UNITED STATES OF AMERICA, *State of Louisiana:*

By Pinckney B. S. Pinchback, acting governor of the State of Louisiana. In the name and by the authority of the State of Louisiana:

Know ye, that I have nominated, constituted, and appointed, and by these presents do nominate, constitute, and appoint, by and with the advice and consent of the senate, P. H. Morgan associate justice of the supreme court, La., vice W. W. Howe, resigned; and I do authorize and empower him to execute and fulfil the duties of the office according to law, and to have and to hold the said office, with all the powers, privileges, and emoluments to the same, from and after the date hereof.

In witness whereof I have hereunto signed my name and caused the great seal of the State to be affixed, at the city of New Orleans,
14 this fourth day of January, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States of America the ninety-seventh.

By the acting governor:

(Signed) P. B. S. PINCHBACK.
(Signed) E. B. MENTZ,
Ass't Secretary of State.

A certified copy of this oath must be filed in the office of the secretary of state:

I, P. H. Morgan, do solemnly swear (or affirm) that I accept the civil and political equality of all men, and agree not to attempt to deprive any person or persons, on account of race, color, or previous condition, of any political or civil right, privilege, or immunity enjoyed by any other class of men; that I will support the Constitution and laws of the United States, and the constitution and laws of this State; and that I will faithfully and impartially discharge all the duties incumbent on me, as associate justice of the supreme court of Louisiana,
15 according to the best of my ability and understanding: So help me God.

P. H. MORGAN.

Sworn to and subscribed before me this thirteenth day of January, 1873. W. L. EVANS,
Second Justice of the Peace, Parish of Orleans, La.

Document No. 2.—*Oath of office.—Offered in evidence by and filed January 20th*, 1873.

I, P. H. Morgan, do solemnly swear (or affirm) that I have not been convicted of treason, perjury, forgery, bribery, or other crime, punishable by imprisonment in the penitentiary; and I do further solemnly swear that I am not subject to the disabilities contained in the third section of the fourteenth amendment to the Constitution of the United States; that I accept the civil and political equality of all men, and

agree not to attempt to deprive any person or persons, on account
16 of race, color, or previous condition, of any political or civil right, privilege, or immunity enjoyed by any other class of men; that I will support the Constitution and laws of the United States, and the constitution and laws of this State; and that I will faithfully and impartially discharge and perform all the duties incumbent on me as associate justice of the supreme court of Louisiana, according to the best of my ability and understanding: So help me God.

(Signed) P. H. MORGAN.

Sworn to & subscribed before me this 13th day of January, 1873.

(Signed) W. L. EVANS,
Second Justice of the Peace, Parish of Orleans, La.

Document No. 3.—Extract of the minutes of the executive session of the senate of the State of Louisiana, held Jan'y 4th, 1873.—Offered in evidence by relator, and filed January 20th, 1873.

17 The secretary called the roll. Present: The presiding officer, and Messrs. Alexander, Barber, Blackburn, Blunt, Butler, Burch, Brewster, Green, Herwig, P. F., Herwig, E. F., Harper, Ingraham, Jenks, Kelse, Masicot, Pollard, Sypher, Stamps, Weber, Wharton—21.

Mr. Ingraham called up the nomination of P. H. Morgan as associate justice of the supreme court of the State of Louisiana.

The president: Will the senate advise and consent to the nomination?

The secretary called the roll, with the following result:

For confirmation: Messrs. Alexander, Barber, Blackburn, Blunt, Butler, Burch, Brewster, Green, Harris, Herwig, P. F., Herwig, E. F., Harper, Ingraham, Jenks, Masicot, Pollard, Sypher, Stamps, Weber, Wharton—20.

Against confirmation: Mr. Kelse.

(Signed) P. E. BECHTEL,
Ass't Secretary of the Senate.

SENATE-CHAMBER, *Jan'y* 18th, 1873.

18 *Document No. 4.—Offered in evidence by relator, and filed January 20th, 1873.*

SENATE, STATE OF LOUISIANA.

Alexander, T. C.	Swords, H. L.
J. R. Alexander.	Sypher, A. J.
Barber, A. E.	Green, Allen.
Blackburn, W. J.	Harris, A. B.
Blunt, Rayford.	Herwig, P. F.
Booth, Edward.	Herwig, E. F.
Butler, Edward.	Harper, Wm.
Burch, J. H.	Ingraham, J. H.
Brewster, O. H.	Jenks, L. B.
Cage, T. A.	Jonas, B. F.
Daigle, F.	Kelse, Geo. Y.
Pollard, Curtis.	
19 Masicot, J. A.	Voorhies, A.
Stamps, T. B.	Weber, E. L.
Thomas, S. M.	Wharton, W. W.
Twitchell, M. H.	Worrell, Rob't.

STATE OF LOUISIANA,
OFFICE OF SEC'Y OF STATE.

This is to certify that the above and foregoing is a true and correct list of senators returned elected, holding over, or seated by the senate, duly and legally acting as senators of the State of Louisiana, on third and fourth days of January, 1873.

Given under my hand and the seal of the State this 18th of January, 1873.

[SEAL.] (Signed) P. G. DESLONDE,
Sec'y of State.

20 604.—*Document No. 5.—Filed January* 20, 1873, *O. M. Tennison, deputy clerk.*

OFFICIAL.

Compiled returns of an election held in the parishes of the State of Louisiana for senators on the 4th day of November, A. D. 1872, *pursuant to the provisions of "An act to regulate the conduct and maintain the freedom and purity of elections," &c., approved March* 16, 1870.

The first senatorial district elects one senator, and is composed of—	C. F. Glaudin.	Edward Booth.	J. H. Wingfield.
First representative district	695	1,156	654
Second representative district	750	875	776
Third representative district	1,948	2,912	1,247
Total	3,393	3,943	2,677

The second senatorial district elects one senator, and is composed of—	A. A. Kerr.	E. Dietiege.	A. Voorhies.
Fourth representative district	374	747	794
Fifth representative district	456	1,281	1,544
Sixth representative district	554	812	951
Total	1,384	2,840	3,289

The fourth senatorial district elects one senator, and is composed of the tenth representative district, which includes the—	D. J. Hutchinson.	B. F. Jonas.
Tenth ward	835	2,057
Eleventh ward	873	1,868
Total	1,708	3,925

The sixth senatorial district elects one senator, and is composed of—	T. B. Stamps.	F. G. Burthe.
Orleans, twelfth ward	311	214
Orleans, thirteenth ward	448	534
Orleans, fourteenth ward	250	209
Jefferson	1,726	981
Saint Charles	1,224	138
Saint John the Baptist	1,166	539
Total	5,125	2,615

The eighth senatorial district elects one senator, and is composed of—	T. S. Cage.	D. S. Cage.
Assumption	1,631	1,411
La Fourche	1,692	1,647
Terre Bonne	1,506	1,403
Total	4,829	4,461

The ninth senatorial district elects one senator, and is composed of—	A. J. Sypher.	R. C. White.	E. Ewing.
Saint Mary	1,541	737	350
Vermilion	424	474	
Total	1,965	1,211	350

The tenth senatorial district elects one senator, and is composed of—	F. A. Riard.	James M. Moore.	T. C. Anderson.
Cameron	21	70	125
Calcasieu	3	354	209
La Fayette	487	673	205
Saint Landry	691	1,357	2,206
Total	1,202	2,454	2,745

The eleventh senatorial district elects one senator, and is composed of—	E. F. Herwig.	J. M. Thompson.
Livingston	254	422
Saint Helena	687	289
Saint Tammany	112	111
Tangipahoa	751	622
Washington	275	356
Total	2,079	1,800

The twelfth senatorial district elects one senator, and is composed of—	James Reed.	E. S. Weber.
East Feliciana	659	1,649
West Feliciana	434	1,349
Point Coupee	704	1,301
Total	1,797	4,299

The thirteenth senatorial district elects one senator, and is composed of—	J. H. Burch.	A. S. Heron.
East Baton Rouge	1,849	1,350

The fourteenth senatorial district elects one senator, and is composed of—	W. W. Wharton.	C. A. Brusle.	U. A. Guilbeau.	J. B. Finney.
Iberville	2,097	817		
Saint Martin	695	176	348	170
West Baton Rouge	827	360		
Iberia	933	591		
Total	4,552	1,944	348	170

The sixteenth senatorial district elects one senator, and is composed of—	George Ralstin.	Robert Worrall.	G. W. Whitney.
Franklin	307	261	200
Tensas	75	1,602	757
Total	382	1,863	957

The seventeenth senatorial district elects one senator, and is composed of—	C. Pollard.	Walsh.
Carroll	1,070	380
Madison	1,207	660
Richland	218	646
Morehouse	721	1,051
Total	3,216	2,739

The eighteenth senatorial district elects one senator, and is composed of—	O. H. Brewster.	R. J. Caldwell.
Caldwell	375	467
Ouachita	1,528	708
Total	1,903	1,175

The nineteenth senatorial district elects one senator, and is composed of—	Allen Green.	C. W. Hodge.	E. M. Graham.
Jackson	510	72	385
Union	529	750	389
Total	1,039	822	774

The twentieth senatorial district elects one senator, and is composed of—	J. W. McDonald.	W. J. Blackburn.
Bienville	915	377
Bossier	.....	1,159
Claiborne	1,324	944
Webster	573	822
Total	2,812	3,304

The twenty-first senatorial district elects one senator, and is composed of—	William Harper.	A. H. Leonard.
Caddo	1,238	627

The twenty-second sentatorial district elects one senator, and is composed of—	Raford Blunt.	C. J. C. Puckett.	Scattering.
De Soto	1,022	790	152
Natchitoches	1,206	.....	.....
Red River	911	362	.....
Sabine	52	798	12
Total	3,191	1,950	164

The twenty-third senatorial district elects one senator, and is composed of—	G. Y. Kelso.	J. G. White.
Rapides	1,920	1,043
Vernon	12	718
Total	1,932	1,761

The twenty-fourth senatorial district elects one senator, and is composed of—	J. G. Hawkes.	J. R. Alexander.	J. F. Kelly.
Catahoula	303	687	572
Grant	190	650	180
Winn	127	54	456
Total	620	1,391	1,148

We, the undersigned returning-officers, pursuant to authority vested in us by act No. 100, approved March 16, 1870, do hereby certify the foregoing is a true and correct compilation of the "statements" of votes cast at an election for senators held on the fourth day of November, A. D. 1872.

And we do hereby declare that the following-named persons were duly and lawfully elected senators of the State of Louisiana, to wit:

First senatorial district, Edward Booth.
Second senatorial district, A. Voorhies.
Fourth senatorial district, B. F. Jonas.
Sixth senatorial district, T. B. Stamps.
Eighth senatorial district, T. A. Cage.
Ninth senatorial district, A. J. Sypher.
Tenth senatorial district, T. C. Anderson.
Eleventh senatorial district, E. F. Herwig.
Twelfth senatorial district, E. L. Weber.
Thirteenth senatorial district, J. H. Burch.
Fourteenth senatorial district, W. W. Wharton.
Sixteenth senatorial district, Robert Worrall.
Seventeenth senatorial district, Curtis Pollard.
Eighteenth senatorial district, O. H. Brewster.
Nineteenth senatorial district, Allen Greene.
Twentieth senatorial district, W. J. Blackburn.
Twenty-first senatorial district, William Harper.
Twenty-second senatorial district, Raford Blunt.
Twenty-third senatorial district, George Y. Kelso.
Twenty-fourth senatorial district, J. R. Alexander.

JOHN LYNCH,
President of Board.
JAMES LONGSTREET,
JACOB HAWKINS,
GEORGE E. BOVEE,
Returning-Officers.

OFFICIAL.

Compiled returns of an election held in the parishes of the State of Louisiana for representatives on the 4th day of November, A. D. 1872, pursuant to the provisions of "An act to regulate the conduct and to maintain the freedom and purity of elections," &c., approved March 16, 1870, to wit:

ORLEANS.

	No. of votes.
First ward—	
J. T. Clark	745
J. Oplatek	553
W. P. Thompson	683
John Langles	674
James Timony	933
J. J. Mellon	1,089
Scattering	84
Second ward—	
D. Wilson	700
E. Provost	723
Joseph A. Shakespear	1,395
R. E. Diamond	639
M. J. Nugent	654

J. J. Finney	902
J. J. Lane	606
J. A. Rice	987
Scattering	230
Third ward—	
E. H. McCaleb	2,505
P. McCabe	1,400
Hugh McCloskey	1,520
D. P. Scanlan	1,475
George Devizin	1,712
W. L. Standford	1,535
W. B. Barrett	1,689
Charles Montaldo	1,849
W. G. Elliott	1,786
P. Barrow	229
A. Dumestre	1,424
M. J. Hart	910
W. H. Moon	241
Fourth ward—	
J. Frederich	278
Thornton Butler	742
George E. Paris	748
T. Bailey Blanchard, jr	860
George Cronan	342
F. C. Zacharie	716
M. Kernberger	7
Fifth ward—	
O. P. Fernandez	1,224
S. R. Snaer	1,195
V. O. King	1,545
Fergus Fuselier	1,779
F. Marqueze	469
Charles Kecknagel	65
Scattering	286
Sixth ward—	
Emile Forstall	817
Joseph Garidel	1,357
Scattering	104
Seventh ward—	
M. Dietrich	742
P. F. Thomas	28
P. H. Desforges	47
C. H. Slocomb	201
Thomas Fernon	1,049
P. Schwager	1,220
L. S. Rodriguez	1,612
John Barrow	1,411

Eighth ward—

Unable to determine from the evidence.

Ninth ward—

Unable to determine from the evidence.

Tenth and eleventh wards—	
Battle Payne	1,512
W. H. Decker	1,600
R. R. Davis	1,612
H. E. Upton	1,426
F. Leibroock	1,246
H. N. Crumhorn	1,176
J. B. Eustis	2,389
James McConnell	2,316
E. Kummel	2,180
Scattering	980
Twelfth, thirteenth, and fourteenth wards—	
L. Sewell	1,005
A. Dejoie	1,003
E. Riviere	810
E. L. Bower	957
Thomas Forstall	154
Fifteenth ward—	
James Hauley	775
A. J. Dumont	944
ASCENSION.	
C. N. Lewis	1,803
Pierre Landry	1,831
Felix Reynaud	564
R. N. Sims	678
AVOYELLES.	
L. J. Souer	1,234
Charles Gray	1,389
T. J. Edwards	1,029
W. K. Johnson	1,131
P. McGloire	452
H. Anderson	556
ASSUMPTION.	
Isaac Sawyer	1,632
Pat Bowman	1,548
E. B. Cox	1,411
N. Vives	1,397
EAST BATON ROUGE.	
C. H. Bryant	1,821
Aug. Williams	1,849
J. P. Wilson	1,834
Tom Bynum	1,358
J. S. Gardner	1,355
T. L. Mills	1,393
Scattering	109
WEST BATON ROGUE.	
T. T. Allain	827
J. D. Lobdell	360
BIENVILLE.	
W. S. Cockerham	969
A. N. Jones	419

BOSSIER.

Percy Baker	1,159
Samuel Thomas	1,159

CADDO.

C. W. Keating	1,535
James Heffner	1,521
John Boyd	1,534
J. C. Moncure	1,471
George L. Smith	1,427
J. Sella Martin	1,355

CAMERON.

T. Lacey	35
Paul Jones	161
Scattering	18

CALDWELL.

A. W. Faulkner	339
Thomas J. Humble	522

CALCASIEU.

W. H. Kirkman	651
Scattering	17

CARROLL.

P. Jones Yorke	461
J. K. Bertou	529
George C. Benham	1,001
Cain Sartain	985
E. J. Delony	378
Simon Witkowski	294

CONCORDIA.

David Young	1,503
George Washington	1,457
W. N. Forbes	193
R. J. Cromwell	220
W. T. Miller	77

CATAHOULA.

Schuyler Marvin	819
Allen J. Davis	653
Scattering	78

CLAIBORNE.

C. F. Blackburn	950
C. B. Fergusen	896
W. F. Moreland	1,341
Thomas Price	1,314

DE SOTO.

John Wiggin	991
W. C. Payton	1,006
J. B. Elam	784
A. T. Stevenson	780

EAST FELICIANA.

John Gair	1,587
James Lanes	1,383
R. H. McClelland	765
H. Hershler	661

WEST FELICIANA.

J. W. Armstead	1,365
John J. Barrow	196
James H. Carrey	135

FRANKLIN.

T. W. Norris	543
W. H. McVey	262

GRANT.

William Ward	768
James Hadnot	132
Scattering	31

IBERVILLE.

Nelson Kenyon	2,074
William Page	2,105
Grourier	846
Ashby	775
Scattering	97

IBERIA.

L. A. Snaer	942
C. Provost	609

JACKSON.

C. J. Green	510
J. T. Cavanaugh	386

JEFFERSON.

E. A. Hubeau	1,703
C. W. Lowell	1,712
William Kern	1,828
R. Gardere	981
W. B. Berthoud	1,011
A. Bonnabel	970
Scattering	70

LIVINGSTON.

T. G. Davidson	346
M. L. Bowman	330

LA FOURCHE.

William Murrell	1,692
John Bibolet	1,690
John S. Billin	1,647
O. Harrang	1,649

LA FAYETTE.

J. D. Trahan	580

Laws of the State of Louisiana.—Published by authority.

No. 11. An act to regulate proceedings in contestations between persons claiming a judicial office.

SECTION 1. *Be it enacted by the senate and house of representatives of the State of Louisiana in general assembly convened*, That in any case in which a person may have been appointed to the office of judge

of any court in this State, and shall have been confirmed by the senate and commissioned thereto, or shall have been elected, and in pursuance of such election shall have been commissioned, such commission shall be *prima-facie* proof of the right of such persons to *immediately* hold and exercise such office.

SEC. 2. *Be it further enacted, &c.*, That if any person being an incumbent of such office shall refuse to vacate the same, and turn the same over to the person so commissioned, such person so commissioned shall have the right to proceed *by rule* before the court of competent jurisdiction to have himself declared to be entitled to such office and to be inducted therein. Such rule shall be taken contradictorily with such incumbent, and shall be made returnable within twenty-four hours, and shall be tried immediately *without jury*, and by preference over all matter or causes depending in such court, or that may be brought in such court, and the judgment thereon shall be signed the same day of rendition.

SEC. 3. *Be it further enacted, &c.*, That either party to such rule may take an appeal from the judgment thereon, but such appeal shall be applied for within *one* legal day from the rendition of the judgment on such rule, and shall be made returnable to the supreme court within *two days*. The appeal shall be taken up by the supreme court by preference over all other cases *immediately* on the application of either party, and the judgment thereon shall become final after the expiration of *one legal day*, whether judicial or not.

SEC. 4. *Be it further enacted, &c.*, That all laws or parts of laws conflicting with this act shall be, and are hereby, repealed, so far as they conflict with this act, and this act shall take effect from and after its passage.

(Signed) CHARLES W. LOWELL,
Speaker of the House of Representatives.

(Signed) C. C. ANTOINE,
Lieutenant-Governor and President of the Senate.

Approved, January 15, 1873.

(Signed) WILLIAM P. KELLOGG,
Governor of the State of Louisiana.

A true copy:

P. G. DESLONDE,
Secretary of State.

21 *Doc.* 9.—*Proclamation.*—*Offered by relator, and filed Jan'y* 20, 1873.

STATE OF LOUISIANA,
Executive Department,
NEW ORLEANS, *Nov'r* 21*st*, 1872.

Whereas the present condition of public affairs presenting an extraordinary occasion, I do hereby, by virtue of the power in me vested by the constitution and laws enacted thereunder, convene the general assembly elected on the fourth day of November, A. D. 1872, in extra session for the period of ten days.

Senators and representatives of the general assembly elected on the fourth day of November, A. D. 1872, and the senators holding over are therefore summoned to meet in their respective chambers at the Mechanics' Institute, now used as a State-House, in the city of New
22 Orleans, at twelve o'clock noon, on Monday, the ninth day of December, A. D. 1872.

In witness whereof I have hereunto set my hand and caused the seal of the State to be affixed, at the city of New Orleans, this twenty-first

day of November, A. D. 1872, and of the Independence of the United States the ninety-seventh.

H. C. WARMOTH,
Governor of Louisiana.

(Signed)
Y. A. WOODWARD,
Ass't Sec't'y of State.

STATE OF LOUISIANA,
Office Sec'y of State:

This is to certify that the above and foregoing is a true and correct copy of the proclamation issued by his excellency H. C. Warmoth, governor, on the twenty-first day of November, A. D. 1872, and that the same is recorded in record-book, page 184.

Given under my hand and the seal of State this 18th day of Jan'y, A. D. 1873.

[SEAL.] (Signed) WILLIAM WEEKS,
Ass't Sec't'y of State.

Document No. 9.—*Filed January* 20*th*, 1873, *and offered in evidence by relator.*

GENERAL ASSEMBLY OF LOU'A, SENATE CHAMBER,
SECRETARY'S OFFICE,
New Orleans, January 18, '73.

I hereby certify that, in accordance with a proclamation issued by his excellency the governor of Louisiana, dated November 21st, 1872, the senate convened in extraordinary session on Monday, December 9th, 1872, and continued in session to Monday, Jan'y 6th, 1873, when it adjourned sine die at 11 o'clock and forty minutes a. m.

(Signed) P. E. BECHTEL,
Sec't'y of the Senate.

Document No. 10.—*Filed in evidence by relator January* 20*th*, 1873.

HOUSE OF REPRESENTATIVES,
OFFICE OF CHIEF CLERK,
New Orleans, Jan'y 20, '73.

Hon. WM. P. KELLOGG,
Governor of Louisiana.

SIR: The house of representatives of the general assembly of the State of Louisiana met in extra session Dec'r 9th, 1872, and, according to the provisions of the election-law, was called to order by William Vigers, clerk of the house of representatives.

On December 17th, 1872, the senate having informed the house of their concurrence in house bill No. 4, "An act extending the time of the extraordinary session of the general assembly," and said act having been signed by Acting Governor P. B. S. Pinchback on December 18th, 1872, the extra session was extended until the first Monday in January, 1873, (January 6th.)

On January 6th, 1873, at 11.45 a. m., the extra session of the house was, on motion of G. C. Benham, of Carroll, declared adjourned sine die.

Respectfully,
(Signed) WILLIAM VIGERS,
Chief Clerk House of Rep's State of La.

Sworn to and subscribed before me this 20th day of Jan'y, 1873.

[SEAL.] (Signed) WILLIAM WEEKS,
Ass't Sec't'y of State.

Document No. 11.—*Filed January 20th, 1873, and offered in evidence by defendant.*

THE UNITED STATES OF AMERICA,
State of Louisiana:

By Henry Clay Warmoth, governor of the State of Louisiana.

In the name and by the authority of the State of Louisiana:
27 Know ye, that I have nominated, constituted, and appointed, and by these presents do nominate, constitute, and appoint, John H. Kennard associate justice of the supreme court in and for the State of Louisiana, vice W. W. Howe, resigned.

And I do authorize and empower him to execute and fulfill the duties of that office according to law, and to have and to hold said office, with all the powers, privileges, and emoluments to the same, from and after the date hereof.

In witness whereof I have hereunto signed my name and caused the great seal of the State to be affixed, at the city of New Orleans, this third day of December, in the year of our Lord one thousand
28 eight hundred and seventy-two, and of the Independence of the United States of America the ninety-seventh.

(Signed) H. C. WARMOTH.

By the governor:

(Signed) Y. A. WOODWARD,
Ass't Sec'y of State.

Document No. 12.—*Oath of office.—Offered by respondent, and filed in evidence January 20th, 1873.*

I, John H. Kennard, do solemnly swear (or affirm) that I have not been convicted of treason, perjury, forgery, bribery, or other crime punishable by imprisonment in the penitentiary; and I do further solemnly swear that I am not subject to the disabilities contained in the third section of the fourteenth amendment of the Constitution of the
29 United States. That I accept the political equality of all men, and agree not to attempt to deprive any person or persons on account of race, color, or previous condition of any political or civil right, privilege, or immunity enjoyed by any other class of men.

That I will support the Constitution and laws of the United States, and the constitution and laws of this State, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as associate justice of the supreme court of Louisiana, according to the best of my ability and understanding. So help me God.

(Signed) JOHN H. KENNARD.

Sworn to and subscribed before me this 3rd of December, 1872.

(Signed) JOHN T. LUDELING,
30 *Chief Justice of the Sup. C't of Louisiana.*

Document No. 13.—*Filed January 20th, 1873, and offered in evidence by respondent.*

I hereby certify that John H. Kennard has filed the oath of office as associate justice of the supreme court of the State of Louisiana in the office of the secretary of state.

Given under my hand and the seal of the State this the 3rd day of December, A. D. 1872, and of the Independence of the U. S. the ninety-seventy.

[SEAL] (Signed) H. C. WARMOTH.

(Signed) Y. C. WOODWARD, *Sec't'y of State.*

31 *Bill of exceptions filed by defendant Jan'y 20, '73.*

Superior district court for the parish of Orleans.

STATE OF LA. EX REL. P. H. MORGAN
vs.
JOHN H. KENNARD. } No. 604.

Be it remembered that on the trial of this cause the defendant filed a prayer for a jury, as by the said prayer in the record will more fully appear; but the court overruled the said application, and refused to permit the defendant to have said jury, to which ruling the defendant then and there duly excepted, on the ground that he was thereto entitled by the Constitution of the United States.

And be it further remembered, that on the trial of this cause, the plaintiff offered in evidence the following documents:

32 1. "Extract of the minutes of the executive session of the senate of the State of Louisiana, held January 4th, 1873," and hereto annexed.

2. "List of the senate of Louisiana, certified by E. G. Deslonde, sec'y of state," and hereto annexed.

3. "An official notice in the New Orleans Republican, of December 9th, 1872, on the 5th page thereof, being compiled returns signed by John Lynch and others, returning officers, declaring certain persons elected senators of the State of Louisiana," and thereto annexed.

4. "The record in the case of the State ex rel. Att'y Gen'l, &c., vs. Jack Wharton and others, No. 18 of the superior district court.

And to the introduction of each and every of said documents, the defendant objected on the ground that the same and each of the same

33 were irrelevant to the issue, and immaterial thereto; but the court in each instance overruled the objection, and admitted said documents, severally, in evidence.

And to said rulings, and each of them, the defendant then and there duly excepted, and reserved this his bill.

The prayer for jury was asked only on the 20th inst., and after the case had been begun on the 18th and continued, and the court on this account, and because the law was not deemed unconstitutional, denied the prayer.

(Signed) JACOB HAWKINS, *Judge.*

App'd: W. H. H.

34 *Judgment rendered January 20th, 1873.*

This proceeding came on for trial.

Present: W. H. Hunt, for relator, P. H. Morgan.

Present: Semmes & Mott & Howe and Prentiss, for defendant.

When, after hearing pleadings, evidence, and counsel, the court considering the law and the evidence to be in favor of the relator, Philip Hickey Morgan, and against the defendant, John H. Kennard,

It is ordered, adjudged, and decreed, that the said John H. Kennard be decreed and adjudged to be unlawfully holding and exercising the duties of said office of associate justice of the supreme court of the State of Louisiana, and that the said Philip Hickey Morgan be decreed and adjudged to be entitled to the said office of associate justice

35 of the supreme court of the State of Louisiana *court of the State of Louisiana.*

Judgment rendered and signed January 20th, 1873.

(Signed) JACOB HAWKINS, *Judge.*

Motion and order for appeal.—Filed January 20th, 1873.

Superior district court for the parish of Orleans.

STATE OF LA. EX REL. P. H. MORGAN
vs.
JOHN H. KENNARD. } No. 604.

On motion of Semmes & Mott and W. W. Howe, of counsel for defendant—

It is ordered that an appeal be allowed the defendant to the supreme court of the State of Louisiana, returnable in two days from the
36 date of this order, on defendant giving bond with surety in the sum of two hundred and fifty ($250) dollars, conditioned as the law directs.

Appeal bond.—Filed Jany. 20th, 1873.

Know all men by these presents, that we, John H. Kennard, as principal, and Samuel H. Snowden, as surety, are held and firmly bound unto John Burke, clerk of the superior district court for the parish of Orleans, his successors, executors, administrators, and assigns, in the sum of two hundred and fifty dollars, for the payment whereof we bind ourselves, our heirs, executors, and administrators firmly by these presents, sealed with our seals, and dated in the city of New Orleans on this 20th day of January, in the year of our Lord one thousand
37 eight hundred and seventy-three.

Whereas the above-bounded John H. Kennard has this day filed a motion of appeal from a final judgment rendered against him in the suit of A. P. Field, attorney-general, ex rel. P. H. Morgan vs. John H. Kennard, No. 604, in the superior district court for the parish of Orleans, on the 20th day of January, 1873, and signed on the 20th day of January, 1873:

Now, the condition of the above obligation is such that the above-bound Kennard shall prosecute his appeal and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in the appeal; otherwise that the said surety shall be liable
38 in his place.

(Signed) JOHN H. KENNARD.
(Signed) SAMUEL H. SNOWDEN.

Signed, sealed, and delivered in the presence of—
(Signed) GEO. W. FLYNN.
39 (Signed) JOHN FAHEY, *Dy. Clerk.*

40 *Evidence.—Filed Jany. 20th*, 1873.

41 STATE OF LOUISIANA.

Superior district court for the parish of Orleans.

STATE OF LA. EX REL. ATTORNEY-general, on the information of the returning-officers of election, &c.
vs.
JACK WHARTON ET ALS. } No. 13,545. Offered in evidence and filed Jany. 20th, 1873.

Petition.—Filed 14 Nov., 1872.

To the honorable the eighth district court for the parish of Orleans:

42 The petition of the State of Louisiana, on the relation of the attorney-general, and on the information of the returning-officers

of election, to wit, Henry Warmoth, Frank J. Herron, Jno. Lynch, James Longstreet, and Jacob Hawkins, composing the board of said returning-officers, respectfully represent—

That the above-named returning-officers of elections are duly qualified as such, and for making the returns of the election held in this State on the 4th of November, instant; that Jack Wharton, F. H. Hatch, Durant Da Ponta are pretending to be such returning-officers, and attempting to act as such, and are interfering with the above-named returning-officers of elections in the discharge of their duties as such officer, and especially with Frank J. Herron, James Longstreet, and Jacob Hawkins, and are intruding into and usurping the office of returning-officers
43 of elections of the State, contrary to and in violation of law and the right of petitioners.

Wherefore, the premises considered, petitioner prays that said Jack Wharton, F. H. Hatch, and Durant Da Ponta be cited to answer this petition, and that, after due proceedings, they be decreed to be intruders into and usurpers of the office of returning-officers of election, & that Frank J. Herron, James Longstreet, and Jacob Hawkins be decreed to be such returning-officers; and petitioner further prays for costs and all general relief.

(Signed) SIMEON BELDEN,
Atty. General.

(Signed) A. P. FIELD, and
J. Q. A. FELLOWS,
Of Counsel.

44 *Citations.—Issued* 14 *Nov.*, 1872.

CITATION.

STATE OF LOUISIANA:

Eighth district court for the parish of Orleans, in the city of New Orleans.

STATE OF LA. EX REL. ATTORNEY-GENERAL, on the information of returning-officers, &c., *vs.* JACK WHARTON ET ALS. } No. 13,545.

Mr. Jack Wharton, Mr. Durant Da Ponta, Mr. F. H. Hatch, N. O., La.:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same, in the office of the clerk of the eighth district court for the parish of Orleans, in ten days after the service hereof.

45 Witness the honorable Henry C. Dibble, judge of the said court, the 14th day of November, in the year of our Lord 1872.

(Signed) ROBERT LYNNE,
[SEAL.] *Dy. Clerk.*

Sheriff's returns.—Filed 18 *Nov.*, 1872.

Received Nov. 15, 1872, and on the same day, month, and year served copy of within citation and accompanying petition upon Jack Wharton, esq., in person.

Ret. same day.

(Signed) J. MEILLEUR,
Dy. Sheriff.

And on the same day, month, and year served copy of within citation and accompanying petition upon Durant Da Ponta, esq., a defendant herein, in person.

Ret. same day.

(Signed) J. MEILLEUR,
Dy. Sheriff.

46 *Sheriff's return*—Continued.

And on the same day, month, and year served copy of within citation and accompanying petition upon F. H. Hatch, esq., in person.

Ret. same day.

(Signed) J. MEILLEUR,
Dy. Sheriff.

Supplemental petition, &c.—Filed 14 *Nov.*, 1872.

Eighth district court for the parish of Orleans.

STATE OF LA., EX REL. ATTORNEY-GENERAL, ON information of F. J. Herron et als.,
vs.
JACK WHARTON ET ALS., } No. 13548.

The supplemental petition of the plaintiffs herein respectfully represent:

47 That all the allegations in the original petition are true, and in addition thereto that the attempt of the said defendants to act in the manner alleged in said petition, and to sit as the returning-officers of elections, and to act as such returning-officers, will defeat the object of this suit and render nugatory the judgment therein prayed for, and that an injunction is necessary to prevent such a defeat of the objects of this suit, and prevent the law and the rights of the State and the parties in interest from being violated.

Wherefore, petitioner prays for a writ of injunction against said Jack Wharton, F. H. Hatch, and Durant Da Ponta, enjoining and restraining them from in any way or manner, either directly or indirectly, sitting or acting as returning-officers of election, and especially of the election held in this State on the 4th of November instant; or from in any manner interfering with the returning-officers named in this petition

48 for whose benefit this suit is brought; and from intruding into and usurping the office of returning-officer of elections; and from in any way interrupting or hindering the returning-officers, and especially Frank. J. Herron, James Longstreet, and Jacob Hawkins, in the discharge of, or performing, the duties of such returning-officer; and petitioner further prays that, after all due proceedings, this injunction be made perpetual, and for costs and all general relief.

(Signed) SIMEON BELDEN,
Atty. General.

(Signed) J. Q. A. FELLOWS, *of Counsel.*

Affidavit.

Personally appeared the undersigned, who, being duly sworn, says that all the allegations and statements of fact in the foregoing

49 supplemental petition are true, and that an injunction is necessary.

(Signed) F. J. HERRON.

Sworn to and subscribed before me this 14th Nov., 1872.

(Signed) THOMAS LYNNE, *Clerk.*

Order.

Let the defendants be ordered to show cause on Saturday, Nov. 16th, at 11 o'clock, a. m., why an injunction should not issue as within prayed for, and according to law. Meanwhile let the defendants be ordered to desist from the acts complained of until the hearing and determination of this rule.

New Orleans, Nov. 14th, 1872.

(Signed) HENRY C. DIBBLE, *Judge.*

50 *Rules nisi.—Issued 14th Nov.*, 1872.

Eighth district court for the parish of Orleans, the State of Louisiana.

STATE OF LA., EX REL. ATTY. GENERAL, ON INformation of returning-officers, &c.,
vs.
JACK WHARTON ET ALS. } No. 13545.

To Jack Wharton, F. H. Hatch, and Durant Da Ponta, N. O., La.:

You are hereby commanded, in the name of the State of Louisiana, and of the eighth district court for the parish of Orleans, to show cause, on Saturday, Nov. 16th, 1872, at 11 o'clock a. m., why an injunction should not issue, as prayed for in the supplemental petition herein, enjoining and restraining you from in any way or manner, either directly or in-
51 directly, sitting or acting as returning-officers of elections, and especially of the election held in this State on the 4th of Nov. instant, or from in any manner interfering with the returning-officers named in said supplemental petition, to wit: Frank. J. Herron, James Longstreet, and Jacob Hawkins, and from intruding into and usurping the office of returning-officer of elections, and from in any way interrupting or hindering the returning-officers aforementioned from performing the duties of such returning-officers.

And in the mean time you are so enjoined and restrained until the disposition of this rule; and herein fail not under penalty of the law.

Witness the honorable Henry C. Dibble, judge of our said court at the city of New Orleans, this 14th day of Novr., in the year of our Lord eighteen hundred and seventy-two, and in the 97th year of the Independence of the United States.

[SEAL.] (Signed) THOMAS LYNNE, *Clerk.*

52 *Sheriff's return.—Filed Nov. 16th*, 1873.

Received Nov. 14, 1872, and on the same day, month, and year served a true copy of the within rule nisi on Jack Wharton in person.

Returned the same day.

(Signed) F. PFISTER,
Dy. Sheriff.

Received Nov. 14th, 1872, and on the 15th day, same month and year, served a true copy of the within rule nisi on F. H. Hatch and D. Da Ponta, both in person.

Ret. same day.

(Signed) F. PFISTER.
Dy. Sheriff.

53 *Citations.—Issued* 14 *Nov.*, 1873.

CITATIONS.

STATE OF LOUISIANA:

Eighth district court for the parish of Orleans, in the city of New Orleans.

STATE OF LA., EX REL. ATTY. GENL., ON INFORMATION of returning-officers, &c.,
vs.
JACK WHARTON ET ALS. } No. 13545.

M— Jack Wharton, Durant Da Ponta, F. H. Hatch, N. O., La.:

You are hereby summoned to comply with the demand contained in the supplemental petition, of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the eighth district court for the parish of Orleans, in ten days after the service hereof.

Witness the honorable Henry C. Dibble, judge of our said
54 court, the 14th day of November, in the year of our Lord 1872.

[SEAL.] (Signed) ROBERT LYNNE,
Dy. Clerk.

Sheriff's return.—Filed 18 *Nov.*, 1872.

Received Nov. 15, 1872, and on the same day, month, and year served copy of within citation and accompanying petition upon Jack Wharton in person.

Ret. same day.

(Signed) JS. MEIULLEUR,
Dy. Sheriff.

Received Nov. 15, 1872, and on the same day, month, and year served copy of within citation and accompanying petition upon Durant Da Ponta in person.

Ret. same day.

(Signed) J. MEILLEUR,
Dy. Sheriff.

55 Received Nov. 15, 1872, and on the same day, month, and year served copy of within citation and accompanying petition upon F. H. Hatch, esq., in person.

Ret. same day.

(Signed) J. MEILLEUR.
Dy. Sheriff.

Continuance (rule.)—Minutes, Nov. 16th, 1872.

Present: The honorable Henry C. Dibble, judge.

STATE OF LA., EX REL. ATTY. GENL., ON INFORMATION of returning-officers of election,
vs.
JACK WHARTON ET ALS. } No. 13545.

The rule nisi herein came on for trial—present, S. Belden and J. Q. A. Fellows, for plaintiff; present, Semmes & Mott for defendant—when, after hearing pleadings and affidavits—

56 It is ordered that this rule nisi be continued to Monday, November 18th, 1872, at 11 o'clock a. m.

Motion to dismiss suit, and same overruled.—Minutes, Nov. 16th, 1872.

Present: Henry C. Dibble, judge.

STATE OF LA., EX REL. ATTORNEY-GENERAL, ON information of returning-officers of election,
vs.
JACK WHARTON ET ALS. } No. 13545.

Now comes H. C. Warmoth, by his counsel, Semmes and Mott, and moves to dismiss the proceedings taken in this case in his name and without his authority, he having never authorized the same.

On presentation of the foregoing motion—

It is ordered by the court that the same be refused.

57 *Answer to rule nisi.—Filed Nov. 16th, 1872.*

Eighth district court for the parish of Orleans.

STATE OF LA., EX REL. ATTORNEY-GENERAL, on the information of returning-officers, &c.,
vs.
JACK WHARTON, F. H. HATCH, AND DURANT Da Ponta, &c. } No. 13545.

The defendants, for cause why the injunction should not issue in this case as prayed for, and for answer to the rule nisi, say:

1. The petition discloses no cause of action of which this court has jurisdiction.

2. The said Wharton, as appears by the affidavits on file, was duly appointed to discharge the duties of the office of secretary of state
58 during the suspension of George E. Bovee, and he is actually and peaceably in the discharge of said duties now, and was so at the time the petitions and supplemental petitions were filed.

3d. That, as it appears by the affidavits on file, the said F. H. Hatch and Durant Da Ponta were duly summoned to act as returning-officers for the election held the first Monday of November, 1872, being the 4th of said month, and qualified as such, and that their selection and appointment are valid.

59 *Continuance.—Minutes, Nov. 18th, 1873.*

Present, the honorable Henry C. Dibble, judge.

STATE OF LA., EX REL. ATTORNEY-GENERAL, on information of returning-officers, &c.,
vs.
JACK WHARTON ET ALS. } No. 13545.

The rule herein continued to this day came on—present, S. Belden and J. Q. A. Fellows, for plaintiff; present, Semmes & Mott, for defendants—when, after hearing further affidavits—

It is ordered that this rule be continued till to-morrow, November 19th, 1872, at two o'clock p. m.

60 *Opinion of court upon the rule nisi.—Filed Nov. 19th, 1873.*

Eighth district court for the parish of Orleans.

STATE OF LA., EX REL. ATTY. GENL., ON INFORMATION of bd. returning-officers, &c.,
vs.
JACK WHARTON ET ALS. } No. 13545.

THE STATE OF LOUISIANA, ON THE INFORMATION of the board of returning-officers,
vs.
JACK WHARTON ET ALS.

The argument of this case has taken a much wider range than the decision of the court need consider. It seems that the issue made between these persons claiming to be returning-officers of elections should be determined upon questions of law aside from any political issue that may urge upon the attention of the court. A petition has been
61 filed by the attorney-general under an act known as the intrusion-in-office act. It sets forth that H. C. Warmoth, John Lynch, F. J. Herron, Jacob Hawkins, and James Longstreet are, under the provisions of the general election law, the board of returning-officers of election. It charges that F. H. Hatch, Durant Da Ponta, and Jack Wharton are illegally assuming and exercising the duties and functions of the board of returning-officers in violation of law. The prayer of the petitioners is that the defendants be decreed to be illegally usurping and unlawfully intruding into these offices, and that there be judgment for the State, declaring that the State and the persons named and joined with the State as plaintiffs be decreed to be the board of returning-officers of election. This petition has simply been filed, and as yet no plea has been made thereto, but a supplemental petition was filed by the attorney-general, joining the persons whom he alleges to
62 be the returning-officers, in which he alleges are likely to so conduct themselves as to render it impossible for the court to execute its judgment should it be in favor of the persons joined with the State, and a prayer is made that the injunction issue against these defendants, restraining them from acting as returning-officers pendente lite. A rule nisi was ordered, and we have heard argument on this application.

To this rule defendants have filed an answer, in which they first plead to the jurisdiction of the court, and, secondly, traverse the facts set up by the State in the petition and supplemental petition. It is insisted by the counsel for the defendants that this court is without jurisdiction in this case, because the persons alleged to be returning-officers and the persons charged with illegally intruding into the said offices are
63 not officers within the meaning of the act known as the intrusion-into-office act, and that therefore this court has no jurisdiction to determine the issue thus attempted to be made, but the act known as the intrusion-into-office act was enacted as a substitute for all statutory provisions regulating writs of quo warranto by which intrusion into common-law courts inquire into the rights of persons claiming to exercise functions of office and franchises, and into the statute by which this suit is brought the right is given to inquire into the right of persons to exercise franchises, a word which has a broad significance and covers the case at bar.

These persons were named officers in the election law, and are claim-

ing to exercise important functions in which the whole State is interested, and in which the whole people of the State are interested, and it is certainly within the province of the attorney-general to inquire
64 into the right of persons claiming to exercise the duties of such offices.

Then, passing from the question of jurisdiction, the defendants make issue with the plaintiff upon the questions of fact set up in the petition and supplemental petitions.

The act known as the election law provides that all returns of election shall be canvassed and declared upon by a board of returning-officers, to consist of the governor, the lieutenant-governor, the secretary of state, and John Lynch and T. C. Anderson.

It was urged by counsel for defendants that the provisions of the law naming those gentlemen as returning-officers seems to be in violation of that provision of the constitution which vests in the governor of the State the appointment of officers. But there is a special provision of the constitution which gives to the legislature of the State the
65 right to take away the power of the governor to appoint officers not vested in him by the constitution. Then it seems that the law was valid in assuming to name the persons who shall be the returning-officers of the State.

The defendants in this rule insist upon this condition of facts: That on the twelfth day of November the board of returning-officers met; that all the members were present except Thomas C. Anderson; that they adjourned to meet on the following day; that on that day they proceeded to and did declare that Anderson and Pinchback were not
66 qualified to sit on the board by reason of having been candidates at the election; that immediately after this decision Jack Wharton, one of the defendants, came into the room and presented a commission for the office of secretary of state, and exhibited his oath of office; that he was thereupon seated as a member of the returning-board; and that the board, as then constituted, consisting of the governor, John Lynch, and Jack Wharton, proceeded to, and did, elect F. H. Hatch and Durant Da Ponte as members of the returning-board, to fill the vacancies existing by reason of the disqualification of Anderson and
67 Pinchback; and that the board is constituted, and is now entitled to proceed to canvass the result of the election.

On the other hand, it is insisted by the State and the persons joined with the attorney-general that when the board met on the thirteenth day of November Mr. Herron was secretary of state, sat in the board as secretary of state, and voted in the board with John Lynch for the election of James Longstreet and Jacob Hawkins to fill the vacancies aforesaid.

Affidavits have been filed pro and con, and from these I gather that when the board met Mr. Herron took his seat, on the thirteenth
68 of November, and a resolution ejecting Pinchback and Anderson was adopted; that immediately thereafter Jack Wharton appeared and claimed his seat as secretary of state; that Herron then made a motion to elect Longstreet and Hawkins as members; and that he and Lynch voted, or thought they voted, for that resolution; and about the same time the governor moved for the election of Da Ponte and Hatch, and he and Wharton voted for that resolution, or though' they voted for it, and that it was adopted. It is almost impossible to tell the exact time at which these motions were put, and the theory I have formed of the case renders it unnecessary for me to examine this point.

69 It seems to me that the case must turn upon two questions of law: First, the validity of the commission to Wharton as secre-

tary of state; secondly, upon the validity of the acts of Herron or Wharton, claiming each to be de facto secretary of state.

There is no longer any question in the State of Louisiana about the fact that the governor has no power to remove any man from office unless the laws of this State have explicitly vested in him that power in the specific instance in which he attempts to exercise the power.

The supreme court has in a number of instances stated this doctrine explicitly. Now Herron, on the thirteenth day of November, was acting secretary of state, whatever that office is; and it seems to me
70 that an attempt on the part of the executive to unconstitutionally exercise his executive will was stricken with absolute nullity from beginning to end. But if the commission issued to Wharton is valid, if the governor had the power to remove a person temporarily occupying that office, and was authorized to commission another person to fill the office, it seems to me still that Herron was de facto secretary of state at the time these transactions occurred at the meeting on the thirteenth of November.

The mere issuance of a commission to a person does not constitute him an officer.

The doctrine of credence given to acts of de facto officers is based
71 on this: that the public has a right to be secure in the validity of acts of officers who, under color of law, exercise functions of office, and have been dealt with and trusted by the public. This is the only reason given by courts for holding valid acts of persons holding office not de jure but de facto; but, in order to consider an act as an act of an officer de facto, he must be in the actual discharge of the functions of his office, must be known so by the public, and must have been dealt with by the public as a public officer or functionary.

Mr. Herron was de facto secretary of state, whether he was so de jure or not, on the whole day of the thirteenth of November.

The statutes sent to me are signed by F. J. Herron, secretary of state. All the people have dealt with Herron as secretary of state; and
72 up to that hour on the thirteenth day of November there was not, perhaps, another person beside the governor in the State who did not believe Herron to be secretary of state, and who would not have dealt with him as secretary of state if he had had business with that office.

The constitution, in article 122, declares that all officers shall remain in the discharge of the duties of their respective offices until their successors have been inducted into office, except in cases of impeachment or suspension.

There is no evidence to show that Wharton had been inducted into office; and but one moment before, in the vote taken, Mr. Herron had been recognized by the executive as secretary of state, and Herron had been sworn in as a member of the returning-board by the chief
73 justice, in the presence of the governor, and without any objection on his part, although it must have been the fact that, at the time the governor permitted the chief justice to swear him in, he had issued a commission to Wharton as secretary of state; but he still recognized Herron as the de facto officer, and he was the de facto officer. Until a person gets a commission and comes in contact with the public his acts are entitled to no credence, and receive no validity from the fact that he has a commission in his pocket.

I therefore consider that, even admitting the commission issued to Wharton is valid, which I do not, Herron was de facto acting as secretary of state, and that his vote, with Mr. Lynch's vote, elected those officers to the board.

74 But much has been said at bar in regard to the acts of the executive in his efforts to defeat the will of the majority of the returning-board as constituted on the thirteenth of November; and his acts have been so frequently designated as a brilliant coup d'etat that I feel called upon to say that the coup d'etat is not an American institution; it belongs to another country, where they have barricades and where they meet to organize governments at midnight. Our Anglo-Saxon liberty proceeds under processes of law, and an individual has no power to change the government of the people; that is done by conventions of the people, and the laws are enacted by legislatures elected by the people, and that in daylight, and their proceedings are pub-
75 lished to the world, and no person, however great his power or however pure his motives, has the power to change the nature of our government, or change the progress of its history, or to defeat the will of the people as expressed in their laws.

It was the desire of the legislature, when it enacted the election law, that the board of returning-officers should consist of certain persons, and care was taken to select persons representing both political parties, and it was without the power of the executive to defeat this will.

I conclude that the courts *has* jurisdiction to try this case under the intrusion-in-office act, and that the returning-officers are officers within the meaning of that act. I hold that Herron is still secretary of state; that his vote on the thirteenth of November determined the elec-
76 tion of Longstreet and Hawkins to the board; that, at all events, whether he was secretary of state de jure or not, he was so de facto, and that by his vote Longstreet and Hawkins were selected as members of the board.

An injunction may properly issue as a supplemental proceeding to a suit under the intrusion-in-office act. The object is to decide who is entitled to exercise the duties and functions of the office.

The duties of the returning-board are soon completed, and if, pending the issue, the defendants attempt that which renders the suit inoperative the court may properly issue its restraining order.

From these considerations the rule nisi will be made absolute, and the injunction issued as prayed for.

Rule absolute.—Minutes, Nov. 19th, 1872.

The rule nisi herein continued to this day for trial came on.

Present: J. V. A. Fellows & A. P. Field, for plaintiff.
" Semmes & Mott, for defendant.

When, after hearing further affidavits and argument, the court, considering the law and the evidence to be in favor of the plaintiff, and for the reasons assigned in the written opinion this day delivered & filed,

It is ordered by the court that this rule nisi be made absolute, and that the injunction issue as prayed for.

77 *Writs of injunction.—Issued Nov. 19th, 1873.*

STATE OF LOUISIANA:

Eighth district court for the parish of Orleans.

STATE OF LA., EX REL. ATTY. GENL., ON INFORMATION of returning-officers, &c.,
vs.
JACK WARTON ET ALS. } No. 13545.

To Jack Warton, F. H. Hatch, and Durant Da Ponta, N. O., La.:

You are hereby commanded, enjoined, and restrained, in the name of

the State of Louisiana and of the eighth district court for the parish of Orleans, from, in any manner, directly or indirectly, sitting or acting as returning-officers of election, and especially of the election held in this State on the 4th of November instant, or from in any manner in-
78 terfering with the returning-officers named in the supplemental petition of the plaintiffs herein, to wit, Henry C. Warmoth, Frank J. Herron, Jno. Lynch, James Longstreet, and Jacob Hawkins, and from intruding into and usurping the office of returning-officers of election, and from in any manner interrupting or hindering the said returning-officers aforementioned, and especially Frank J. Herron, James Longstreet, and Jacob Hawkins, in the discharge of or performing the duties of such returning-officers.

And you are so enjoined and until the further order of this honl. court.

Witness the honorable Henry C. Dibble, judge of our said court, this 19th day of November, in the year of our Lord one thousand eight hundred and seventy-two, and in the 97th year of the Independence of the United States.

[SEAL.] (Signed) ROBT. LYNNE, *Dy. Clerk.*

79 *Sheriff's returns.—Filed December* 2, 1872.

Received Nov. 20, 1872, and, on the 22nd day same month and year, served a true copy of the within writ of injunction on F. H. Hatch and Durant Da Ponta, both in person.

Ret. same day.

(Signed) FRANK PFISTER, *Dy. Sheriff.*

And on the 28th day, same month and year, served a true copy of the within writ of injunction on Jack Wharton in person.

Ret. same day.

(Signed) FRANK PFISTER, *Dy. Sheriff.*

80 *Motion for new trial.—Filed Nov.* 21, 1872.

In the eighth district court for the parish of Orleans.

STATE OF LA., EX REL. ATTY. GENL., ON INFORMATION OF RETURNING-OFFICERS, *vs.* JACK WHARTON & ALS. } 13545.

On motion of Semmes & Mott, of counsel for the defendants—

It is ordered that the plaintiffs shew cause on Monday the 25th inst., at 11 o'clk. a. m., why a new trial shall not be granted in the above-entitled case, on the ground that the judgment rendered is contrary to law and the evidence; and also because the plaintiff and relators have no standing in court, the law under which the relators claim having been repealed.

81 *Sheriff's returns.—Filed Nov. 26th,* 1872.

Received Nov. 22nd, 1872, and on the same day of same month and year, served a true copy of within rule on plaintiffs herein, thro' their attorney, A. P. Field, esq., in person.

Ret. same day.

(Signed) P. J. KELIMPIO, *Dy. Shff.*

Received Nov. 22nd, 1872, and on the 23rd day of same month and year, served a true copy of the within rule on A. P. Field, esq., attorney for plaintiff, in person.

Ret. same day.

(Signed) P. J. KELEMPIO,
Dy. Shff.

82 *Exception.—Filed Nov. 25th, 1872.*

Eighth district court for the parish of Orleans.

STATE OF LA. EX REL. ATTY. GENL., ON INFORMATION of returning-officers, &c.,
vs.
JACK WHARTON ET ALS. } No. 13545.

Now come the defendants and except to the petition of plaintiffs, and the right to have and maintain the said suit, on the ground and for the reason that this court has no jurisdiction of the subject-matter thereof, and pray that the same may be dismissed.

(Signed) SEMMES & MOTT,
Attys. for Defdt.

83 *Rule continued.—Minutes Nov. 25th, 1873.*

Present: The honorable Wm. A. Elmore, judge.

STATE OF LA., EX REL. ATTY. GENL., ON INFORMATION of returning-officers, &c.,
vs.
JACK WHARTON ET ALS. } 13545.

The rule for new trial herein fixed for this day was ordered to be continued to Monday, December 2d, 1872, at 11 o'clock a. m.

Rule submitted.—Minutes, Dec. 2d, 1872.

Present, the honorable Wm. A. Elmore, judge. The rule for a new trial herein came on for trial; present, Semmes & Mott, for
84 plaintiff, in rule; present, Jno. Ray, for defendant, in rule; when, after hearing pleadings and counsel, the court took the matter under advisement.

Rule absolute.—Minutes, Decbr. 3rd, 1872.

Present, the honorable Wm. A. Elmore, judge. In the matter of the rule herein for new trial, submitted to the court for determination, after deliberation and for the reasons assigned in the written opinion this day delivered and filed, it is ordered that this rule be made absolute, and a new trial granted herein.

85 *Reasons for granting new trial.—Filed Dec. 3rd, 1873.*

No. 13545.

I am satisfied that the act of the legislature of Louisiana No. approved the 20th of November, 1872, repeals the act of that legislature No. approved 1870; and that the returning-board cre-

ated by the latter act has ceased to exist, and there are no members of any returning-board, and that all the powers granted to the members of the returning-board by act of 1870 are revoked and annulled, and that no one has authority to count the votes or make returns of the election of 1872 until new appointments are made by proper authority. I therefore grant a new trial.

86 *Motion and order dismissing suit.—Minutes, December 3rd*, 1873.

On motion of Semmes & Mott, of counsel for defendants, and on suggesting that the court has decided in granting a new trial; that there is no returning-board of elections in Louisiana because the act No. 4, approved 1868, creating the returning-board, has been repealed by the act No. approved 20th November, 1872; and on further suggesting that if there is no returning-board there is no party complaining, or who can complain, it is ordered that the injunctions granted and issued in this case be dissolved and annulled & the suit dismissed.

87 *Petition of intervention and appeal.—Filed* 17 *Dec.*, 1872.

To the honorable the judge of the superior district *district* court in and for the parish of Orleans, State of La.:

The petition of Alexander P. Field, a resident of said parish and State, respectfully represents unto your honorable court that at an election held in said State on the 4th day of November, A. D. 1872, that he was duly elected attorney-general of the State of Louisiana, has been so returned elected by the legal returning-board or officers of said election, and has been commissioned as such. Petitioner further represents that he is interested in the result of the suit entitled State, ex rel. atty. genl., on information of returning-officers, vs. Jack Wharton et als., No. 13545; that the plaintiffs in said suit are the legal returning-officers and board of the election held as aforesaid, by which your petitioner was legaliy returned as elected; that the judgment in said case is opposed to plaintiffs in said suit, which jeopardises the position of your petitioner in his said office, whereby your petitioner has an interest in having said judgment annulled and set aside. Petitioner avers that he has an interest exceeding five hundred dollars in this case in amount of his salary as attorney-general, his salary being five thousand dollars per annum. Wherefore petitioner prays your honorable court to grant him an appeal, suspensive and devolutive, in this case, returnable to the supreme court, at New Orleans, according to law, & for general & equitable relief, &c.

88

(Signed) JOHN RAY,
For Petitioner.

89 (Signed) HENRY C. DIBBLE,
Of Counsel.

Affidavit.

Plaintiff in the above petition, Alexander P. Field, being duly sworn, says, the facts and allegations contained in the within petition are true and correct according to the best of his knowledge and belief.

(Signed) A. P. FIELD.

Sworn to & subscribed before me this 17th day of Decr., 1872.

[SEAL.] (Signed) JOHN BURKE, *Clerk.*

Order.

Let this petition of intervention be filed.

Let a devolutive appeal be granted herein as prayed for, re-
90 turnable to the supreme court at New Orleans the first Monday in January, 1873, upon plffs. giving bond in the sum of three hundred dollars, conditioned as the law directs.

New Orleans, Dec. 17, 1872.

(Signed) B. L. LYNCH,
Judge fourth district court, acting in the place of Hon. J. Hawkins, judge superior district court, recused.

Bond of appeal.—Filed 17 *Dec.*, 1872.

Know all men by these presents, that we, A. P. Field, as principal, and Simeon Belden, as surety, are held and firmly bound unto Jno. Burke, clerk of the superior district court for the parish of Orleans, his successors, executors, administrators, and assigns, in the sum of three hundred
91 dollars, for the payment whereof we bind ourselves, our heirs, executors, administrators, and assigns, in the sum of three hundred dollars, for the payment whereof we bind ourselves, our heirs and administrators, firmly by these presents. Sealed with our seals, and dated in the city of New Orleans, on this 17th day of December, in the year of our Lord one thousand eight hundred and seventy-two.

Whereas the above-bounded A. P. Field this day filed a petition of appeal from a final judgment rendered against the relators, the board of returning-officers of elections, &c., in the suit of State of Louisiana, ex rel. attorney-general, on information of returning-officers of election vs. Jack Wharton & als., No. 13,545, in the eighth dist. court for the
92 parish of Orleans, on the day of November, 1872, and signed on the day of November, 1872; said record was transferred from said eighth district court to the superior district court for the parish of Orleans, and numbered 18 of the docket thereof:

Now the condition of the above obligation is such that the above-bound A. P. Field shall prosecute his said appeal, and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if they be cast in the appeal; otherwise that the said Simeon Belden, surety, shall be liable in his place.

(Signed) A. P. FIELD. [SEAL.]
(do.) SIMEON BELDEN. [SEAL.]

Signed, sealed, and delivered in the presence of—
(Signed) GEO. W. FLYNN.

93 *Judgment.*

Superior district court for the parish of Orleans.

STATE OF LOUISIANA, EX REL. ATTORNEY-GENERAL, on the information of the returning-officers of election,
vs.
JACK WHARTON ET ALS.
} No. 13,545 of the late 8th district court for the parish of Orleans, but No. 18 of this court.

On motion of Semmes & Mott, of counsel for defendants, and on suggesting that the court has decided, in granting a new trial, that there is no returning-board of elections in Louisiana, because the act No. ,

approved , 1868, creating the returning-board, has been repealed by the act No. , approved November 20th, 1872, and on further suggesting that if there is no returning-board, there is no party complaining or who can complain—

94 It is ordered that the injunction granted and issued in this case be dissolved and annulled, and the suit dismissed.

Judgment rendered by W. A. Elmore, judge of the late eighth district court for the parish of Orleans, on the 3rd day of December, 1872, and signed by B. L. Lynch, judge of the 4th district court for the parish of Orleans, acting as judge of the superior district court for the parish of Orleans, in the place of Jacob Hawkins, judge of said court, recused, on the 2nd day of January, 1873.

(Signed) B. L. LYNCH,
Judge of the 4th district court for the parish of Orleans, acting in place of the Judge of the superior court for the parish of Orleans, recused.

95 *Petition of intervention.—Filed Jan. 2nd*, 1873.

In the superior district court for the parish of Orleans.

STATE OF LOUISIANA, EX REL. ATTORNEY-GENERAL, upon the information of Henry C. Warmoth, Frank J. Herron, John Lynch, James Longstreet, and Jacob Hawkins, board of returning-officers, *vs.* JACK WHARTON, F. H. HATCH, & DURANT DA PONTE.	Intrusion into office, No. 18.

Petition of intervention for the purpose of appeal.

To the hon. the judge of said court:

The petition of Alexander P. Field, a resident of the parish of
96 Orleans, State of Louisiana, respectfully shows unto this hon. court, that at an election held in this State on the 4th day of November, 1872, he was duly elected attorney-general of the State of Louisiana; that he has been duly commissioned as such; that his commission was issued upon the returns of his election, duly made by the legal returning-board, composed of the persons joined with the State and attorney-general as plaintiffs in this case, or a majority of them, acting as a returning-board of elections.

And your petitioner further shows that he is interested in the result of the above-entitled action, numbered 13,545 of the docket of
97 the late eighth district court in and for the parish of Orleans, and No. 18 of the docket of this hon. court, and has been and is aggrieved by the judgment rendered therein; that it is the intention of persons interested in said judgment to use the same to jeopardize, cloud, and unsettle the title of your petitioner to the said office of attorney-general of said State, and to effect and bring about a loss to your petitioner of the salary and emoluments belonging to said office and lawfully accruing to and belonging to your petitioner, and cause the same to be received and enjoyed by some other person.

And your petitioner further shows that he has a pecuniary interest in the result of this cause directly involved therein exceeding the
98 sum of one thousand dollars.

Wherefore your petitioner prays that this petition and his affidavit thereto attached be considered, this hon. court will allow this his intervention to be filed, and will also allow him to appear in this cause and, by motion in due form of law, appeal from the final judgment rendered in this cause to the supreme court of this State, in order that the final judgment herein in favor of the defendants and against the plaintiffs in said action may be reversed and revised by said supreme court; and your petitioner will ever pray, &c.

(Signed) A. P. FIELD,
In propria persona.
" JOHN RAY,
" H. C. DIBBLE.
Attys. for Petitir.

99 *Motion for appeal.—Filed Jany. 2nd, 1873.*

Superior district court for the parish of Orleans.

STATE OF LOUISIANA, BY THE ATTORNEY-General, et als., *vs.* JACK WHARTON ET ALS. } No. 18. Motion for appeal.

On motion of John Ray & Henry C. Dibble & J. Q. A. Fellows, attorneys for Alexander P. Field, intervenor, and third person desiring an appeal from the judgment in this cause, and on considering the sworn petition of the said Alexander P. Field this day filed in this cause, and the order of the court thereon, and on suggesting to the court that the said Field has a pecuniary interest involved in and affected by the
100 final judgment in this cause, signed on the 2nd of January, A. D. 1873, exceeding the sum of one thousand dollars, and that he is aggrieved by said judgment and has a right to appeal therefrom—

It is ordered by the court that the said Alexander P. Field be, and he is hereby, allowed an appeal to the supreme court of the State from said judgment herein, returnable to the said supreme court at the city of New Orleans, on the first Monday in January, A. D. 1873, and that said appeal be both suspensive and devolutive upon the said Alexander P. Field, appellant, giving bond with surety in the sum of three hundred dollars, and bound as the law directs.

Appeal bond.

Filed Jan'y 2nd, 1873.
(Signed) JOHN BURKE, *Clerk.*

101 Know all men by these presents that we Alexander P. Field, as principal, and B. Campbell, of the city of New Orleans, as surety, are held firmly bounden unto John Burke, clerk of the superior district court for the parish of Orleans, his successors in office, his or their heirs, executors, administrators, and assigns, in the full sum of three hundred dollars, for the payment whereof, well and truly to be made, we, by these presents, do firmly bind ourselves, our heirs, executors, and administrators.

Signed and sealed with our seals and dated at the city of New Orleans the second day of January, 1873.

The condition of the above obligation is such, that whereas the above bounden Alexander P. Field has this day, by motion in open court, appealed to the supreme court of the State from a final

judgment rendered against the plaintiffs and in favor of the defendants the suit numbered eighteen of the docket of the said superior district court for the parish of Orleans, wherein the State of Louisiana, upon the information of attorney-general and upon the information of Henry C. Warmoth, Frank J. Herron, John Lynch, James Longstreet, and Jacob Hawkins, returning-officers of elections, are plaintiffs, and Jack Wharton, F. H. Hatch, and Durant Da Ponte are defendants, as will more fully and at large appear by the record of said suit and action, which said judgment was rendered on the third day of December, A. D. 1872, and signed and made final on the second day of January, A. D. 1873, as appears by the record thereof; the said action having been originally brought in the late eighth district court in and for the parish of Orleans, and by law transferred to said superior district court.

Now, if the above bounden Alexander P. Field shall prosecute his said appeal and shall satisfy whatever judgment may be rendered against him by said supreme court, as well as all costs and damages that may be adjudged against him on said appeal, or the be satisfied by the proceeds of his property, real and personal, then this bond shall be null and void; otherwise the said B. Campbell, surety, shall be liable in his place instead.

(Signed) A. P. FIELD.
(Signed) B. CAMPBELL.

Signed, sealed, and delivered in presence of—
(Signed) J. R. BECKWITH.

Clerk's certificate.

I, John Burke, clerk of the superior district court for the parish of Orleans, and as such duly commissioned and sworn, do hereby certify that the foregoing 103 pages contain a full, true, and correct transcript of all the proceedings had, documents filed, testimony and evidence adduced, upon the trial of the cause wherein The State of Louisiana, ex relatione P. H. Morgan, are relators, and John H. Kennard is respondent, and numbered 604 of the docket of the superior district court for the parish of Orleans, except the document containing the promulgation of the election of the judges of the different district courts of the State by the returning-board, which document was not furnished to the clerk in time to be copied in this transcript; excepting also the documentary evidence filed in suit No. 18 of the docket of this court, and entitled "State of Louisiana, ex rel. Attorney-General, on the information of the returning-officers of election, *vs.* Jack Wharton et als.," said suit being offered in evidence herein, and forms a portion of this transcript.

In testimony whereof I hereunto set my hand and affix the impress of the seal of our superior district court for the parish of Orleans, on this 22d day of January, in the year of our Lord 1873, and of the Independence of the United States the 97th.

[SEAL.] JOHN BURKE, *Clerk.*

PROCEEDINGS IN THE SUPREME COURT.

Supreme court of La.

Motion to fix.

Filed Jan'y 24th, 1873.
(Signed) THO. McCABE HYMAN,
Depy. Clerk.

Extract from the minutes.

FRIDAY, *Jan'y* 24th, 1873.

The court was duly opened. Present: their honors Jno. T. Ludeling, chief justice, and James G. Taliaferro, Rufus K. Howell, & John H. Kennard, associate justices. Absent: W. G. Wyly, ass'e justice.

THE STATE, EX REL. P. H. MORGAN, *vs.* J. H. KENNARD. } No. 4499.

On motion of A. P. Field, atty. genl., and of Wm. H. Hunt, esq're, atty. for the relator, it is ordered by the court that this case be fixed for hearing on Monday, 27th inst., at 11 o'clock a. m.

Supreme court of La., Monday, Jan'y 25th, 1873.

Notice.

108 STATE OF LA., EX REL. P. H. MORGAN, *vs.* JOHN H. KENNARD. } No. 4499.

To the Hon. John H. Kennard, greeting:

You are hereby notified that the above entitled and numbered suit is fixed for trial on the 27th day of January, 1873, at 11 o'clock a. m.

[SEAL.] (Signed) T. M. C. HYMAN, *Depy. Clerk.*

Sheriff's return.

Filed January 27th, 1873.
(Signed) M. P. JULIAN, *Dy. Clerk.*

Received Jan'y 25th, 1873, and on the same day served copy of the within notice of trial on the Hon. J. H. Kennard personally. Returned same day.
(Signed) JNO. L. LEWIS, *Dy. Sheriff.*

Supreme court of La.

Extract from the minutes.

MONDAY, *January 27th*, '73.

The court was duly opened pursuant to adjournment: Present
109 their honors John T. Ludeling, chief justice, and James G. Taliaferro, Rufus K. Howell, William G. Wyly, associate justices; absent John H. Kennard, ass'e justice.

STATE OF LA., EX REL. P. H. MORGAN, *vs.* JOHN H. KENNARD. } No. 4499.

This case was called for trial, and having heard argument from Wm. H. Hunt, esq're, of counsel for plaintiff and appellee, and Thos. J. Semmes, esqre., of counsel for the defendant, appellant herein,

The court took the same under advisement upon the briefs for appellant and the papers now on file.

Supreme court of La.

Extract from the minutes.—Decree.—Thursday, January 30th, 1873.

The court was duly opened.

Present: their honors John T. Ludeling, chief justice, and
110 James G. Taliaferro, Rufus K. Howell, Wm. G. Wyly, and John H. Kennard, ass'e justices.

His honor the chief justice pronounced the judgment and decree of the court in the following case:

STATE OF LOUISIANA, EX REL. P. H. MORGAN, *vs.* JOHN H. KENNARD. } On appeal from the superior district court for the parish of Orleans.

It is ordered and adjudged that the judgment of the lower court be affirmed with costs of appeal. (Mr. Justice Kennard was recused in this case. Mr. Justice Howell, concurring, reserves the right to file his reasons. Mr. Justice Wyly, dissenting, read a separate opinion herein.)

Opinion of the court.

Filed Jan'y 31st, 1873.

(Signed) M. P. JULIAN, *Dep'y Clerk.*

THE STATE OF LOUISIANA, EX REL. P. H. Morgan, *vs.* JOHN H. KENNARD. } No. 4499. Appeal from the superior district court for the parish of Orleans.

Mr. Chief-Justice LUDELING:

On the 16th day of January, 1873, the following was filed: "On motion of A. P. Field, atty. genl. of the State of La., herein appearing upon the relation of P. H. Morgan, a resident of the parish of Orleans, and upon suggesting and giving the court to understand and be informed as follows, viz: That said P. Morgan was nominated by the acting governor of the State to the senate thereof to fill the office of associate justice of the supreme court of the State of La.; that his said nomination was duly confirmed; that he was commissioned thereto on the 4th of January, 1873; that he has taken and subscribed the oath required by law; that he is entitled and empowered to execute and fulfill the duties of said office according to law; and to have and to hold said office, with all the powers, privileges, and emoluments thereof; and on
112 further suggesting that John H. Kennard, also a resident of said parish, unlawfully holds said office, and executes the duties thereof, and claims the right to the office and to the powers, privileges, and emoluments thereof: It is ordered that said John H. Kennard shew cause on Saturday, January 18th, 1873, at 11 o'clock a. m., why it should not be forthwith decreed and adjudged that he is unlawfully holding and exercising the duties of said office of associate justice of the supreme court of the State of La., and the said P. H. Morgan be decreed and adjudged entitled thereto."

On the day on which said rule was made returnable, the 18th of Jan'y, John H. Kennard filed the following exception:

"And now comes John H. Kennard and excepts that there has been

no citation issued herein, or served on him in this case, and prays to be hence dismissed with costs."

This exception was overruled by the court a quo; and then the
113 defendant filed the following exceptions and answer, to wit:

"Now comes John H. Kennard, defendant in this suit, and excepts to the rule herein taken by A. P. Field, atty. genl., on relation of P. H. Morgan, on the ground that said proceeding, by rule, in manner and form as set forth in said rule, is not authorized by law, and, further, that the act of 15th January, 1873, entitled 'An act to regulate proceedings in contestations between persons claiming a judicial office,' as to its first section is unconstitutional and void, not being in conformity to the title of said act; and, further, that said act is prospective, and does not apply to pending litigation; and, further, that said act, in relation to section two and three, is unconstitutional, as it authorizes proceedings which amounts to a denial of justice; and, further, that if said act is to be construed as applicable to suits instituted prior to its passage, it is retroactive and void, as violative of article 110 of the constitution.

"In case these exceptions be overruled and not otherwise, for
114 answer to said rule, this respondent avers that he was duly appointed by the governor of this State to the office of ass'e justice of the supreme court of the State of La. on 3rd Dec., 1873, vice W. W. Howe, resigned during the recess of the senate, and that on the same day he was duly qualified and took possession of said office, having complied with all legal acquirements, and his term of office has not yet expired."

The exceptions were overruled on the 18th of Jan'y, 1873, and the trial of the rule, which had been fixed for the 18th Jan'y, 1873, was commenced and was continued to Monday, the 20th instant.

On the 20th Jan'y the following amended and supplemental answer and prayer for jury was filed: "Now comes John H. Kennard, and for further answer prays for a trial by jury, and pleads that the said act of the legislature, under which relator, P. H. Morgan, claims to proceed, is null and void, as violative of section one, article 14th of the
115 Constitution of the United States, which forbids any State from making any law which shall abridge the privileges and immunities of its citizens, and prohibits any State from depriving any person of life, liberty, or property without due process of law, or to deny to any person within its jurisdiction the equal protection of its laws; and if said law is void this court has no jurisdiction to proceed by rule in the manner and form as set forth in said rule."

The prayer for a jury was refused by the judge a quo on the grounds that it was made only on the 20th of Jan'y, after the trial of the case had been commenced on the 18th, and continued for trial to the 20th, and because the act of the 15th of January, 1873, forbids it. The trial was concluded on the 20th day of January, and judgment was rendered in favor of the relator and against the defendant on the same day. The defendant has appealed.

During the course of the trial several bills of exceptions were
116 taken to the rulings of the district judge, which we will proceed to notice.

The first bill of exceptions is to the refusal of the prayer for a jury, on the ground that the defendant was entitled thereto under the Constitution of the United States. It was decided by this court, as early as 1818, that the provisions of the Federal Constitution relative to juries refer only to trials in the Federal courts, and not to those in the State courts. (Maurin vs. Martinez, 5 Mart., 436.) And in Dabbs vs. Hemp-

ken, decided in 1842, this court said: "The claim of a constitutional right to a trial by jury in all controversies, where the amount exceeds $20, has been so long settled by this court that it is unnecessary to comment on it now." (3 Rob., 126.)

In the case of the City Bank vs. Banks et als., Chief-Justice Eustis said: "The trial by jury in criminal cases is guarantied by the Constitution; in civil cases it rests with the legislature alone, and they
117 have provided that certain classes of cases shall be tried without the intervention of juries." (1 An., p. 419.)

But even if the defendant had been entitled to a trial by jury, he had forfeited his right by not claiming it in time. (Code of Practice, articles 494, 495; 2 An., 651; La. State Bank vs. Ledoux et als., and 3 An., 198.)

We do not think that the 14th amendment of the Constitution of the United States makes any change on the subject of jury trials in civil suits. The plaintiff offered in evidence the following documents: 1, extracts of the executive session of the senate of the State of La., held Jan'y 4th, 1873; 2nd, list of the senate of La., certified by R. L. Deslonde, secretary of state; 3rd, an official notice in the New Orleans Republican of Dec. 9th, 1872, on the 5th page thereof, being compiled returns signed by John Lynch and others, returning-officers, declaring certain persons elected senators of the State of La.; and, 4th, the record in the case of the State, ex rel. atty. genl., etc., vs. Jack Wharton and others, No. 18 of the superior district court. To the introduction of each and every one of said documents the defendant objected, on the ground that the evidence was irrelevant. The objection was overruled, and the evidence was received. We are of opinion that the evidence was properly received.

118

The defendant alleged in his answer that he had been appointed during the recess of the senate to fill the vacancy created by the resignation of Mr. Justice Howe, and "that the term of his office had not yet expired," claiming that, under article 61 of the constitution, his commission did not expire until the "end of the next session" of the senate. It was pertinent, therefore, to prove that there had been a session of the senate, and that that senate had confirmed the appointment of the plaintiff. The fact that subsequently, during the argument of the cause, the counsel for defendant did not question the fact that there had been a senate of the State of La. in session, but contented themselves
119 in simply contending that there had been but one session of the legislature, which was still continuing, does not make the evidence offered less germane to the issues in this case. Nor is it a reason to reject the evidence that we might have taken judicial cognizance of the fact that there had been an extra session of the legislature subsequently to the appointment of the defendant. Considering the technical objections which have been urged to prevent a trial on the merits of this case, it is not surprising that extraordinary prudence should have been exercised by the plaintiffs in the introduction of evidence in support of his case.

We will notice the several exceptions urged against this suit. The first relates to the want of a citation. The form and manner of bringing litigants into court is a matter entirely within legislative control. Code of Practice, art. 97, declares: "Civil actions may be prosecuted, according to the nature of the case, by three kinds of proceedings, to
120 wit, ordinary, executory, and summary." Art. 98 declares that "the proceedings are ordinary when citation takes place, and all the delays and forms of law are observed. They are executory when

seizure is obtained against the property of the debtor, without previous citation in virtue of an act or title importing confession of judgment, or in other cases provided by law.

"They are summary when carried on with rapidity and without the observance of formalities required in ordinary cases, as when courts provide for the administration of vacant successions and the property of minors and absent heirs."

In the case of City of New Orleans vs. Elijah Cannon, the defendant was sued for the city tax of 1853, and was cited under the 35 section of the consolidation act of 1852, which substituted in lieu of petition and citation the constructive service, by advertisement, of the tax-bill in the official newspapers of the city. Mr. Justice Voorhies, being the organ of the court, held that such proceedings, in the absence of petition
121 and citation, are not unconstitutional, and that summary proceedings clearly fall within the term "due process of law." (10 An., pages 764, 767.)

In 11 An., p. 375, Chief-Justice Merrick, as the organ of the court, said: "It is in the power of the legislature to determine in what manner parties may be brought into court, and we have recently decided, in regard to city taxes, that a decree rendered upon such notice is obligatory." "The proceeding by rule is not new under the laws of this State, and, whenever the legislature authorizes it, that form of remedy may be adopted by litigants. The delays allowed by the new law are in no sense in conflict with the Constitution of the United States. The delay of one day to answer, if insufficient, would undoubtedly be extended by the court, if requested to do so. The Code of Practice provides that, when the defendant appears, he may pray for further time to answer, and the court may grant further delay if necessary for the purposes of justice." (Art. 316.)

122 The exception that the law of January 13th, 1873, violate' section one of article 14th of the Constitution of the United States is utterly without foundation. It merely provides a more speedy remedy for the settlement of contests for judicial offices. It is based upon sound considerations of public policy.

The maintenance of the rights of person and property, the preservation of the public peace, security, and order, depend upon the prompt, certain, and uninterrupted administration of law. In order to secure such an administration of the law, it is essential that those who exercise power should be clothed with unchallenged authority. For this purpose, no doubt, the legislature of La. passed the law providing for a speedy trial and settlement of conflicting claims of persons to judicial offices. In Rice vs. De Buys, this court said: "Necessity appears to require that the possession of the elective offices shall be determined without the delays of an ordinary lawsuit." (5 An., 398.) In Borga-
123 tede vs. Clark, the court said: "But in this proceeding no appeal is permitted, no matter what may be the pecuniary value of the office. In the case of De Buys, the constitutionality of this provision of the statute was debated. We sustained its constitutionality, and refused to entertain an appeal, because we considered the contest a matter of public concernment, and not a lawsuit between individuals." (5 An., 732.)

Another exception to the mode of proceeding is, that the suit should have been in the name of the claimant, Morgan, alone, and not in the name of the State, &c.

We deem it sufficient to state that Morgan is a party plaintiff with the State, and he has been represented by private counsel in both courts.

If it be conceded, therefore, that the new law authorized the suit in the name alone of the party claiming the office, the State having been joined with him in his demand did not invalidate the proceeding—"utile per inutile non vitiatur." But see 5 Wheaton, 291, Wallace vs. Anderson, 5 An., 732; State, ex rel. Wickliffe, vs. Delassize, 21. An., 711.

124

The other exceptions are equally without foundation. The title of the law does indicate sufficiently its object, and the law was not designed to have any retroactive effect. The suit was instituted on the 16th of January, 1873, after the promulgation of the law in question, which was in operation, by the terms of the law, "from and after its passage." On the merits, the question is, have the plaintiffs proved their demand; have they shown that P. H. Morgan was appointed and confirmed to the office of associate justice of the supreme court of the State of La.? The public is concerned in knowing this fact. To determine that question, it is necessary to know if his appointment was made by the governor of the State, and if that appointment has been confirmed by the senate of the State. The appointment was made by P. B. S. Pinchback, who signs the commission as acting governor of the State of La. Was he acting governor of the State? We have no doubt of the fact. He was elected president of the senate in December, 1871, after the death of Lieutenant-Governor Dunn; as such he became lieutenant-governor during the unexpired term of Oscar J. Dunn. Section 1560 of the digest of the statute of this State, provides that "in case of the vacancy in the office of governor, the lieutenant-governor shall be governor; in case of vacancy in the office of lieutenant-governor, the senate shall elect a president, who shall be lieutenant-governor." (P. 142.) The law does not say, during his senatorial term, but that he "shall be lieutenant-governor." If the governor had died or resigned the day after, the lieutenant-governor would have become governor. Can it be pretended that, under those circumstances, the office of governor would have become vacant by the operation of the term for which P. B. S. Pinchback had been elected a senator? We think not. He was lieutenant-governor when Governor Warmoth was impeached by the house of representatives. During his impeachment the governor was suspended, and the "powers and duties of the office devolved upon the lieutenant-governor." (Const. of La., art. 53.)

125

126

Was the senate which confirmed P. H. Morgan the senate of the State of La.? It was composed of persons returned as elected to the secretary of state by the returning-officers recognized by this court to be the legal returning-officers at the late election. (Const., art. 46.) It was organized at the State-house by those whose names had been furnished by the secretary of state to the secretary of the senate, in accordance with the election law of this State; it was presided over by the lieutenant-governor, and, subsequently, it was recognized by the acting governor of the State as a part of the general assembly. It is tacitly admitted by the defendant that the body of men who confirmed the appointment of Morgan is the senate, for he attacks a law under which this suit is brought, enacted by the general assembly of which this senate forms a part, not on the ground that the act was not passed by the legislature, but on the ground that the law violates the constitution of the State and of the United States.

127

Though we have not the power to decide who are the members of the general assembly, yet we, as judges, are bound to know what assemblage of men constitute the State legislature, for we are bound to know what are the laws of this State, in order to adjudicate upon the rights

of litigants under the law. We are of opinion, therefore, that P. H. Morgan was duly appointed and confirmed associate justice of the supreme court, vice W. W. Howe, resigned, during the recess of the senate. But it is contended that John H. Kennard was appointed associate justice of the supreme court to fill the same vacancy, and that the term of his office has not yet expired. Article 61 of the constitution declares
128 "The governor shall have power to fill vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of the next session thereof, unless otherwise provided for in this constitution," etc. We deem it unnecessary to decide in this case whether or not the commission of the defendant would entitle him to hold the office after the appointment and confirmation of another person to the same office, until the end of the next session of the senate; for, in this case, it is shown that a session of the senate was held after the defendant's appointment was made, and that that session ended on the sixth day of January, 1873, and before the meeting of the regular session of the general assembly. The language of the constitution seems too clear to admit of but one construction—"until the end of the next session of the senate." It is not denied that there was an extra session of the general assembly convened on the
129 ninth day of December, 1872, but it is contended that the constitution, in article 61, refers to ordinary or regular sessions. The constitution authorizes the governor to convene the legislature on extraordinary occasions. There is no reason, therefore, to say that art. 61 refers only to the regular and annual sessions of the general assembly, and we cannot construe article 61 in the manner contended for by the defendant without interpolating the words "regular or ordinary" in the article, which of course we cannot do. It is manifest, from article 75 of the constitution, that it was the intention of the framers of the constitution that the judges of the supreme court should be appointed by the governor, "with the advice and consent of the senate," and article 61 provides for a contingency which might arise, but it limits the duration of the commission of the officer appointed when the advice of the senate could not be had, to the end of the "next session of the senate,"
130 during which session the governor can, if he wishes, have the advice of the senate. This limitation was a restriction upon the power conferred upon the governor, ex necessitate rei.

There is no merit in the defence. It is, therefore, ordered and adjudged that the judgment of the lower court be affirmed, with costs of appeal.

Concurring opinion of Mr. Justice Howell.

Filed Jan'y 31st, 1873.
(Signed) M. P. JULIAN,
Depy. Clerk.

In addition to the reasons given by the chief-justice in this case, in which I concur, I desire to say that the right or title of either party to the office in controversy is fixed and governed by the constitution of this State, and is in no manner dependent on or affected by the act approved 15th of January, 1873, which simply relates to the form of
131 proceeding in certain cases, and if it should be unconstitutional in any or all of its provisions, we would still, I think, under our constitution and laws, have the power to say who is, prima facie, entitled, without a judicial investigation by an inferior tribunal, to a seat with us on the supreme bench. The constitution of the State provides

that the supreme court shall be composed of one chief-justice and four associate justices, a majority of whom shall constitute a quorum. They (the five) shall be appointed by the governor, with the advice and consent of the senate, for the term of eight years. (Art. 75.) When a vacancy happens during the recess of the senate, the governor has the power to fill it by granting a commission which shall expire at the end of the next session of the senate. (Art. 61.) All commissions shall be in the name and by the authority of the State of La., and shall be sealed with the State seal, signed by the governor, and countersigned by the secretary of state. (Art. 72.)

132 Under these provisions the right of the plaintiff P. H. Morgan to a seat as associate justice of the supreme court, by virtue of a commission showing his appointment by the governor, with the advice and consent of the senate, vice W. W. Howe resigned, when he presented it, with an oath of office, after the expiration of the extra session of the legislature convened on 9th December, 1872, was clear. The defendant's commission was issued under art. 61 of the constitution, and by that article could have vigor, at the best, only until the expiration of the above-mentioned session, which occurred before the plaintiff claimed his seat; and we could rightfully have admitted him, or rather could not rightfully have prevented him, had he insisted on taking his seat. His right, prima facie at least, was equal to that of either one of us. We are bound to know who compose the supreme bench, and we knew the rights of these parties before this suit as well as we now do.

133 But as each member of the supreme court must be appointed by the governor, with the advice and consent of the senate, for the constitutional term, it follows, in my opinion, that a commission in due form, showing that an appointment to fill an unexpired part of such term has been made with the advice and consent of the senate, is, at least, prima-facie evidence of the right to the immediate possession of such office, whether the session of the senate had expired or not at which such appointment had been confirmed. The appointment by the governor, without the aid of the senate, is, in its nature and essence, provisional only, and is necessarily and immediately superceded by subsequent appointment made with such aid, it being the mode of appointment specially provided by the constitution for the supreme court. In my opinion the defendant has, by his pleadings, clearly admitted the legality and validity of the authority under which the plaintiff

134 Morgan claims the office of associate justice. He does not directly assail the commission issued to the plaintiff, the official capacity of those who signed it, or the legality of the senate which confirmed the appointment, or of the legislature which enacted the law under which these proceedings were instituted; yet as his exceptions and answer might possibly be construed, in reference to plaintiff's allegations, so as to raise the question, I think it not inappropriate for this court to express an authoritative opinion thereon in this case. It is confirmatory of the pleadings and facts of the case. No question is raised as to notice of the rule, service of which was made on defendant, else he would not have been in court.

I really cannot see any reasonable ground of defence.

Dissenting opinion of Mr. Justice Wyly.

135 This is a contest for the office of associate justice of the supreme court. The proceeding is under act approved 15th January, 1873, entitled "An act to regulate proceedings in contestations between persons claiming a judicial office."

This act provides that if the incumbent shall refuse to vacate the office, the "person so commissioned shall have the right to proceed by rule. * * * Such rule shall be taken contradictorily with such incumbent, and shall be made returnable within twenty-four hours, and shall be tried immediately, without jury, and by preference over all other matters or causes depending in such court, and the judgment therein shall be signed the same day of rendition. That either party to such rule may take an appeal from the judgment thereon, but such appeal shall be applied for within one legal day from the rendition of the judgment on such rule, and shall be made returnable to the
136 supreme court within two days. The appeal shall be taken up in the supreme court by preference over all other cases, immediately on the application of either party, and the judgment thereon shall become final after the expiration of one legal day, whether judicial or not."

This law was approved on 15th day of January, 1873, and on the next day the plaintiff filed the following motion on rule, which I copy verbatim: "On motion of A. P. Field, att'y-gen'l of the State of La., herein appearing upon the relation of Philip Hickey Morgan, a resident of the parish of Orleans, and upon suggesting and giving the court to understand and be informed as follows, to wit:

"That said P. H. Morgan was nominated by the acting governor of the State to the senate thereof to fill the vacancy of associate justice of the supreme court of La.; that his said nomination was confirmed; that he was commissioned thereto on 4th Jan'y, 1873; that he has taken
137 and subscribed the oath required by law; that he is entitled and empowered to execute and fill the duties of said office according to law; and to have and to hold said office with all the powers, privileges, and emoluments thereof.

"And on further suggesting that John H. Kennard, also a resident of said parish, unlawfully holds said office and executes the duties thereof, and claims the right to the said office and to the powers, privileges, and emoluments thereof:

"It is ordered that said John H. Kennard show cause on Saturday, January 18th, 1873, at 11 o'clock a. m., why it should not forthwith be decreed and adjudged that he is unlawfully holding and exercising the duties of said office of associate justice of the supreme court of the State of La., and the said P. H. Morgan be decreed and adjudged entitled thereto."

On the 18th of January, 1873, the defendant filed the following exception, to wit:

138 "And now comes J. H. Kennard, and excepts that there has been no citation issued herein or served on him in this case, and prays to be hence dismissed with costs."

On the same day the following exception and answer was also filed, to wit:

"Now comes John H. Kennard, defendant in this suit, and excepts to the rule herein taken by A. P. Field, attorney-general, on the relation of P. H. Morgan, on the ground that said proceeding by rule in manner and form as set forth in said rule is not authorized by law; and further, that the act of the 15th January, 1873, entitled 'An act to regulate proceedings in contestations between persons claiming a judicial office,' as to its first section is unconstitutional and void, not being in conformity to the title of said act; and, further, that said act is prospective and does not apply to pending litigation.

"And, further, that said act, in relation to section two and three,

139 is unconstitutional, as it authorizes proceedings which amount to a denial of justice.

"And, further, that if said act is to be construed as applicable to suits instituted prior to its passage, it is retroactive and void as violative of article 110 of the constitution.

"In case these exceptions be overruled, and not otherwise, for answer to said rule this respondent avers that he was duly appointed by the governor of the State to the office of associate justice of the supreme court of the State of La., on 3rd day of December, 1872, vice W. W. Howe, resigned during the recess of the senate, and that on the same day he was duly qualified and took possession of said office, having complied with all legal requirements, and his term of office has not yet expired."

On the same day, Saturday, January 18th, 1873, these exceptions were overruled by the court, and the case was continued for trial till Monday, the 20th January, 1873, on which day the defendant filed

140 the following supplemental answer, to wit:

"Now comes J. H. Kennard, and for further answer prays for a trial by jury, and pleads that the said act of the legislature under which the relator P. H. Morgan claims to proceed, is null and void, as violative of section one, article 14th of the Constitution of the United States, which forbids any State from making any law which shall abridge the privileges or immunities of its citizens, and prohibits any State from depriving any person of life, liberty, or property without due process of law, or to deny to any person within its jurisdiction the legal protection of its laws; and if said act is void, this court has no jurisdiction to proceed by rule in the manner and form as set forth in said rule."

On the same day the prayer for trial by jury was refused. The case was tried and judgment entered up for the plaintiff. The defendant immediately took this appeal. I have copied all the pleadings

141 and noted the orders of court, because I differ with the majority of the court as to an issue upon which they pass, which issue I maintain is not raised in the pleadings; therefore, all that the majority of the court say in reference to that point, to wit, the legality of the Pinchback government is, in my judgment, a mere obiter dictum, and utterly without judicial effect. The evidence upon which the observation of the court on this point is based was excepted to by the defendant on the ground of irrelevancy. It being offered to prove an issue not raised by the pleadings, I think the exception was well taken, and the evidence should not have been received.

Having copied the pleadings I now copy the bill of exceptions, in order that it may appear whether the evidence excepted to was pertinent to the issues made up by the plaintiff and the defendant.

It is as follows:

"Be it remembered that on the trial of this cause the defendant

142 filed a prayer for a jury, as by the said prayer in the record will more fully appear; but the court overruled the said application, and refused to permit the defendant to have said jury, to which ruling the defendant then and there excepted, on the ground that he was thereto entitled by the Constitution of the United States.

"And be it further remembered, that on the trial of this cause the plaintiff offered in evidence the following documents:

"1°. 'Extract of the minutes of the extra session of the senate of the State of La., held January 4th, 1873,' and hereto annexed.

"2°. 'List of the senators of La., certified by P. G. Deslonde, secretary of state,' and annexed hereto.

"3°. 'An official notice in the New Orleans Republican of December 9th, 1872, on the 5th page thereof, being compiled returns, signed by John Lynch and others, returning-officers, declaring certain persons elected senators of the State of La.,' and hereto annexed.

"4°. 'The record in the case of the State of La., ex rel. Atty.-
143 Genl. vs. Jacob Wharton and others, No. 18, of the superior district court.'

"And to the introduction of each and every one of said documents, the defendant objected, on the ground that the same, and each of the same, were irrelevant thereto; but the court in each instance overruled the objection and admitted said documents, severally, in evidence; and to said rulings, and each of them, the defendant then and there duly excepted, and reserves this his bill. The prayer for jury was asked only on the 20th instant, and after the case had been begun on the 18th and continued; and the court on this account, and because the law was not deemed unconstitutional, denied the prayer."

Now, what are the issues?

It is alleged in the rule that on the 4th January, 1873, P. H. Morgan was duly appointed by the acting governor and confirmed by the senate; that he has taken the oath of office, and is entitled to the possession of the office of associate justice; that John H. Kennard un-
144 lawfully holds said office and claims the right to exercise it, and also the privileges and emoluments thereof. Upon these averments it is asked that Kennard be decreed to be unlawfully holding said office, and that Morgan be adjudged entitled thereto.

To this the defendant has not pleaded the general denial. He simply excepts to the form of the proceeding; pleads the unconstitutionality of the act of 15th January, 1873; and alleges that on the 3rd day of December, 1872, he was appointed to said office by the governor during the recess of the senate; that he qualified and took possession thereof, and that his term of office has not yet expired.

Under these simple issues what relevancy can be found for the introduction of a document containing a list of the senators certified by Deslonde, secretary of state, an extract from the New Orleans Republican, showing the compiled returns signed by John Lynch and
145 others, declaring certain persons elected senators of the State, and the record of the case of the State, ex rel. Atty.-Genl., vs. Jack Wharton and others?

Why should this case be encumbered with such documents, which have no more relevancy to the issues presented by the parties than they have to any other law-suit pending in any of district courts of the parish of Orleans?

Indeed if these documents are pertinent to the issues of this case, then we had as well *to* abolish the rule that proof may be refused for irrelevancy, that the plaintiff cannot prove what he has not alleged. The list of the senators, the returns of John Lynch and others, and the case of Jack Wharton have no more to do with the allegations of the plaintiff and the defendant in this suit, than the list of the jurors of the 1st district court, the returns of the presidential electors, and any
146 transcript that may be found in the clerk's office of the Supreme Court would have to do with it.

The defendant does not plead that the statute of the 15th of January, 1873, is void for want of authority in its authors to act as members of the general assembly; nor does he aver that the commission issued to

P. H. Morgan is invalid because Pinchback had no authority to act as governor; no such issues have been made by the pleadings.

The questions are: Is the act of 15th January, 1873, providing a remedy so summary, constitutional, and is the term of office of J. H. Kennard expired?

Believing that these are the issues presented in this case, I feel constrained to express my opinion that the observations of the majority of the court in regard to the late acting governor of the State, the organization of the general assembly, and the legality of the late extra session thereof, are remarks not necessary to the decision of this case,
147 and are merely opinions outside of the issues involved in this controversy, and therefore not obligatory.

I find that the first section of the act of the 15th January, 1873, declaring that the commission is prima-facie proof of the right of the holder to the immediate possession of the office, is not covered by the title, "An act to regulate proceedings between persons claiming a judicial office," and for that reason it is repugnant to article 114 of the constitution, and void.

I find from the record that there was no citation, service of citation, or anything equivalent thereto; and that the defendant was not served even with a copy of the rule upon which this action is based. His exception on this ground was undoubtedly well taken.

Citation, or some notice equivalent thereto, is the foundation of the action, and a proceeding without it is utterly void, unless the defendant waives it and voluntarily enters an appearance. (C. P., 206.)
148 The act of 15 January, 1873, authorizing the proceeding by rule does not dispense with the law requiring citation or notice; on the contrary it declares that "such rule shall be taken contradictorily with such incumbent, and shall be made returnable within twenty-four hours, and shall be tried immediately without jury," etc., etc. I understand from this statute that citation or notice of the rule shall be served, and that it shall be returnable within twenty-four hours from the time of service. This seems to be a fair interpretation of the statute, because it must be construed with reference to article 206, C. P., and other laws requiring notice of judicial proceedings.

If the law, however, requires the rule to be returnable within twenty-four hours from the time it is filed, and the trial to begin immediately, I think it contravenes the constitution of this State and the Consti-
149 tution of the United States, because a proceeding under it would, practically, *deny* the defendant of some legal right without due process of law. Due process of law implies a fair hearing before judgment. (Cooley's Constitutional Limitations, p. 353, et seq., and authorities there cited.)

To be a fair hearing there must be legal notice of the demand, and a reasonable delay allowed for preparing the defence. In my opinion, the statute under which this rule is taken does not allow such delay; it authorizes a proceeding by which the defendant in this case is deprived of his legal right to the office of associate justice of the supreme court, without due process of law.

The defendant is deprived of a legal right without citation or legal notice of the proceeding, and without reasonable delay to prepare and make his defence.

150 The statute as applied to this case, in my judgment, contravenes the constitution of this State and the Constitution of the United States, and it is therefore void. On this ground, I think, the demand of the plaintiff should be dismissed.

On the merits I find that the defendant was duly commissioned as associate justice of the supreme court on the 3rd Dec., 1872, during the recess of the senate; that he took the required oath of office and entered regularly on the duties thereof. He was appointed under art. 61 of the constitution, which declares that "the governor shall have power to fill vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of the next session thereof." * * * * * * *

Article 17 declares that "the general assembly shall me't annually on the first Monday of January." * * *

151 Article 64 provides that the governor "may on extraordinary occasions convene the general assembly."

Now, in order to ascertain whether the term for which the defendant was appointed has expired, it is necessary to determine the exact meaning of that part of article 61 which says his term "shall expire at the end of the next session" of the general assembly. Does it mean at the end of the next regular session, or at the end of the next extra session? Was that clause used in reference to art. 17, fixing the beginning of the regular sessions on the first Monday of January, annually; or was it used in reference to article 64, giving the governor the right on extraordinary occasions to convene the general assembly? I believe the clause was used with reference to the regular sessions provided for in the constitution, and not in reference to such extra sessions as extraor-

152 dinary occasions might demand; that article 61 refers to the normal state of things, and not to the extraordinary or abnormal.

As the regular session, beginning on the first Monday of January, 1873, has not yet expired, I believe the term for which Judge Kennard was appointed, under art 61 of the constitution, has not expired; and therefore the action of the plaintiff is premature, and his demand should be rejected.

For the reasons stated, I feel constrained to dissent in this case.

* * * * * *

153 *Certificate.*

UNITED STATES OF AMERICA,
Supreme Court of Louisiana.

I, M. P. Julian, depy. clerk of the supreme court of the State of Louisiana, holding sessions at the city of New Orleans, do hereby certify that the foregoing one hundred and fifty-two pages contain a full, true, and complete copy of the transcript of the proceedings had in the superior district court for the parish of Orleans, in a certain suit wherein P. H. Morgan was plaintiff and John H. Kennard was defendant, and also of all the proceedings had in this supreme court on the appeal taken by said defendant, which appeal is now on the files thereof, under No. 4,499.

154 In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of New Orleans, this 4th day October, anno Domini one thousand eight hundred and seventy-three, and in the ninety-eighth year of the Independence of the United States of America.

In the absence of John M. Howell, clerk,

[SEAL.] M. P. JULIAN,
Dep'y Clerk.

155 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Lousiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the supreme court of the State of Louisiana, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the State of Louisiana, on the relation of Philip Hickey Morgan against John H. Kennard, wherein was drawn in question the validity of a treaty, or statute, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, & the decision was in favor of such their validity; or wherein was drawn in question the Constitution, or of a treaty or statute of, or a commission held under, the United States, & the decision was against the title, right, privileges, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said John H. Kennard, as by said complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Salmon P. Chase, Chief-Justice of the said Supreme Court, this 4 day of February, in the year of our Lord one thousand eight hundred and seventy-three.

Clerk of the United States Circuit Court
for the District of Louisiana.

(Indorsed:) United States circuit court, No. . versus . Writ of error. Supreme court of La. Filed February 5th, 1873. M. P. Julian, depy. clk.

156 JOHN H. KENNARD, PLFF. IN ERROR,
vs.
P. H. MORGAN.

John H. Kennard, being duly sworn, deposes and says that he has this fifth day of February, 1873, received the telegram, a true copy of which (printed) is hereto annexed; that he verily believes the information in said telegram contained is true, and that the Supreme Court of the United States has granted a writ of error to operate a supersedeas in this case, now on appeal in said court; that the said writ was granted within ten days from the rendition of a final judgment by the supreme court of Louisiana, and in the case of Att'y-General ex rel. P. H. Morgan

vs. John H. Kennard, No. 4,499 of the docket of the supreme court of Louisiana; that in order to give due notice within ten days from the rendition of said judgment in favor of P. H. Morgan, he forthwith lodges a citation in said supreme court of Louisiana, in the clerk's office; that he is also advised and believes said advice to be true; that the writ so issued was mailed in Washington last night, Feb'y 4th or 5th, of all of which he is prepared to make due proof.

JOHN H. KENNARD.

Sworn to and subscribed before me this 5th day of February, 1873.
[SEAL.] P. B. VINOT,
U. S. Comm'r.

157 THE CASE OF JUDGE KENNARD.

Writ of error granted by the United States Supreme Court.

The following telegram was received this morning by Judge Kennard

"Writ of error granted. Citation and bond sent by mail."

The following is a copy of writ:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Louisiana, greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the supreme court of the State of Louisiana, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the State of Louisiana on the relation of Philip Hickey Morgan against John H. Kennard, wherein was drawn in question the validity of a treaty, or statute, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the Constitution, or of a treaty or statute of, a commission held under the United States, and the decision was against the title, right, privileges, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said John H. Kennard, as by said complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceeding aforesaid being inspected, the said Supreme Court may cause further to

be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief-Justice of the said Supreme Court, e' fourth of February, in the year of our Lord one thousand eight hundred and seventy-three. Issued fourth February, 1873. Clerk of Supreme Court of the United States. Allowed by Associate Justice Bradley.

M. C. KERR.

This is a true copy of the telegram referred to in the above affidavit.
JOHN H. KENNARD.

Sworn to and subscribed before me this 5th day of February, 1873.
[SEAL.] F. B. VINOT,
U. S. Comm'r.

(Indorsed:) Supreme court of Louisiana. No. 4499. John H. Kennard, plff. in error, vs. P. H. Morgan. Writ of error to supreme court of La. from U. S. Supreme Court. Filed Febr'y 5th, 1873. M. P. Julian, depy. clk., sup. court. Semmes & Mott, J. A. Campbell, & W. W. Howe, attys. for plff. in error. Supreme court of La. Filed Febr'y 10th, 1873. M. P. Julian, depy. clk.

157*a* UNITED STATES OF AMERICA, *ss.*

The President of the United States to the honorable the judges of the supreme court of the state of Louisiana, and holding sessions in New Orleans, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, being the highest court of the law or equity of the said State in which a decision could be had in the suit between the State of Louisiana ex rel. P. H. Morgan vs. John H. Kennard, No. 4499 of the docket of the said supreme court of the State of Louisiana, wherein was drawn in question the validity of a certain act of the general assembly of the State of Louisiana, entitled "An act to regulate proceedings in contestations between persons claiming a judicial office," approved January 15th, 1873, which act, & more particularly the second & third sections of said act, it is averred, violates the first section of the 14th amendment of the Constitution of the United States, the decision of the supreme court of the State of Louisiana has been rendered in favor of the validity of the said act, a manifest error hath happened, to the great damage of the said John H. Kennard, as by his complaint appears: we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that of error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Salmon P. Chase, Chief-Justice of the said Supreme Court of the United States, this twelfth day of February, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.] F. A. WOOLLEY,
Clerk of the United States Circuit Court for the District of Louisiana.

(Indorsed:) United States circuit court, No. 4499. John H. Kennard, plaintiff in error, versus P. H. Morgan, defendant in error.

WRIT OF ERROR: Copy of a writ of error lodged in the clerk's office of the supreme court of the State of Louisiana, in pursuance of the statute in such cases made and provided, this 13th day of February, one thousand eight hundred and seventy-three. Semmes & Mott, attorneys of plaintiff in error. Filed Febr'y 13th, 1873. M. P. Julian, depy. clk.

Rec'd Feb'y 13th, 1873, and served a copy of the within writ on P. H. Morgan in person on the same day, and returned same day.

JNO. L. LEWIS,
Dy. Shff. Parish of Orleans.

Filed Febr'y 13th, 1873.

M. P. JULIAN,
Depy. Clk. Sup. Court.

158 John H. Kennard, being duly sworn, says the original writ, hereto annexed, reached him by mail late in the day of February 17th, 1873, and that the delay is due to no laches of his.

Sworn to & subscribed before me this 18th day of February, 1873.

JOHN H. KENNARD.
M. P. JULIAN,
Depy. Clerk.

159 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges
[SEAL.] of the supreme court of the State of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Louisiana, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the State of Louisiana on the relation of Philip Hickey Morgan against John H. Kennard, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision
160 was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said John H. Kennard, as by said complaint appears; we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done the parties aforesaid in this behalf, do

command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief-Justice of the said Supreme Court, the fourth day of February, in the year of our Lord one thousand eight hundred and seventy-three.

Issued 4 February, 1873.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

JOSEPH P. BRADLEY,
Associate Justice of the Sup. Court U. S.

(Indorsed:) Writ of error in original. John H. Kennard vs. Philip Hickey Morgan. Supreme court of La. Filed Febr'y 18th, 1873. M. P. Julian, depy. clk. sup. court.

161 Know all men by these presents, that we, John H. Kennard, as principal, and Samuel H. Snowden, as surities, are held and firmly bound unto P. H. Morgan in the full and just sum of two thousand four hundred $\frac{00}{100}$ dollars, to be paid to the said P. H. Morgan, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated day of in the year of our Lord one thousand eight hundred and sixty .

Whereas lately, at a session of the supreme court of Louisiana, holding sessions in the city of New Orleans, (La.,) in a suit depending in said supreme court, wherein P. H. Morgan is plaintiff and John H. Kennard is defendant, final judgment was rendered against the said John H. Kennard, defendant, and the said John H. Kennard having obtained a writ of error, and filed a copy thereof in the clerk's office of the said supreme court to reverse the judgment in the aforesaid suit, and a citation directed to the said P. H. Morgan, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington, the Monday of next: now the condition of the above obligation is such that if the said John H. Kennard, plaintiff in error, shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

JOHN H. KENNARD. [L. S.]
SAML. H. SNOWDEN. [L. S.]

Sealed and delivered in the presence of
[SEAL.]

JULES MOSSY,
U. S. Commissioner for the District of Louisiana.

(Indorsed:) United States circuit court. No. 4499. State, ex rel. P. H. Morgan, vs. John H. Kennard. Bond for writ of error approved.

Jos. P. Bradley, asso. justice Sup. Ct. U. S. Filed Feb'ry 10th, 1873. M. P. Julian, depy. clk.

Saml. H. Snowden, being duly sworn, deposes and says that he is a resident of New Orleans, and is worth more than twenty-four hundred dollars over and above all his debts and liabilities.

SAM'L H. SNOWDEN.

Sworn to and subscribed before me on the 25th of January, 1873.
[SEAL.] JULES MOSSY,
United States Commissioner for Louisiana.

162 The United States of America to Philip Hickey Morgan and A. P. Field, who, as attorney-general of the State of Louisiana, files the information in behalf of said Morgan, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Louisiana, wherein John H. Kennard is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Joseph P. Bradley, associate justice of the Supreme Court of the *Court of the* United States, this 4th day of February, in the year of our Lord one thousand eight hundred and sixty-three.

JOSEPH P. BRADLEY,
Associate Justice of Sup. Ct. U. S.

(Indorsed:) Citation. Original. John H. Kennard vs. Philip Hickey Morgan.

Received Febr'y 10th, 1873, and on the same day, month, and year, served copy of the within writ of error on Philip Hickey Morgan in person.

J. ELLWOOD,
Dy. Sheriff.

Filed Febr'y 10th, 1873.

M. P. JULIAN,
Depy. Clerk.

163 JOHN H. KENNARD *vs.* P. H. MORGAN. } Supreme Court. No. 4499.

To P. H. MORGAN:

Please take notice that I have this 18th day of February, 1873, lodged in the supreme court of Louisiana in this case the original writ of error allowed February 4th, 1873, by Joseph P. Bradley, associate justice of the Supreme Court U. States, two copies of which have been heretofore lodged and served on you. That this original writ only reached me by mail February 17th, 1873, and that the delay was caused by no laches of mine. That this lodgment of the original writ is within the ten days

within which by act of Congress it can be made to operate a supercedeas.

(Signed) JOHN H. KENNARD.

A true copy:

M. P. JULIAN,
Depy. Clk.

Rec'd 18th Feb'y, 1873, and on the same day served copy of the above notice on the Hon. P. H. Morgan in person. Ret'd same day.

JNO. L. LEWIS,
Dy. Shff. Parish of Orleans.

(Indorsement on cover:) No. 272. John H. Kennard, plaintiff in error, vs. The State of Louisiana, ex rel. Philip Hickey Morgan. Louisiana sup. ct. Filed 17th October, 1873.

No 272

Supreme Court of the United States.

JOHN H. KENNARD, Plaintiff in Error,

VERSUS

THE STATE OF LOUISIANA, *ex rel.* PHILIP HICKEY MORGAN.

In Error to the Supreme Court of the State of Louisiana.

Brief for Plaintiff in Error.

THOS. J. SEMMES,
ROBERT MOTT,
HOSMER & CO.,
Of Counsel.

Clark & Hofeline, Book and Job Printers, 112 Gravier street.

Supreme Court of United States.

JOHN H. KENNARD, Plaintiff in Error,

VERSUS

THE STATE OF LOUISIANA, *ex rel.* PHILIP HICKEY MORGAN.

In Error to the Supreme Court of the State of Louisiana.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

On the third of December, 1872, John H. Kennard, was during a recess of the Senate of Louisiana, appointed by the Governor, Associate Justice of the Supreme Court of Louisiana, vice W. W. Howe, resigned.

An election for members of the House of Representatives, was held in the month of November, 1872.

On the 21st day of November, 1872, a proclamation was issued by the Governor, calling an extra session of the General Assembly to convene at the Capitol, New Orleans, on the *ninth* day of December, 1872.

In answer to this call, the General Assembly did convene, with a view of meeting at the time and place indicated in the proclamation. Durell's famous midnight order, aided by United States troops, intervened and prevented the organization.

Pinchback's faction soon got control, and proceeded in what was styled an extra session, until January 6th, 1873, when an adjournment "sine die" took place. (R. p. 15.)

On the fourth day of January, 1873, Pinchback, acting Governor, commissioned Philip Hickey Morgan, Associate Justice of the Supreme Court of Louisiana, vice W. W. Howe, resigned. (R. p. 4, Doc., No. 1.)

On the same day, January 4th, 1873, Philip Hickey Morgan was confirmed by the so-called Kellogg Senate. (Record, page 5.)

John H. Kennard, claimed to hold under his appointment of December, 1872, made during a recess of the Senate, until the expiration of *the next regular session* of the General Assembly. This regular session terminated March 1st, 1873.

Kennard's claim as to the duration of his commission, is based upon the sixty-first article of the State Constitution, which is in these words:

Art. 61—"The Governor shall have power to fill all vacancies, that may happen during the recess of the Senate, by granting commissions, which shall expire at *the* end of *the* next session thereof, unless otherwise provided for in this Constitution." There is no article in the Constitution providing otherwise.

Morgan on the other hand, contended that Kennard's commission expired with the extra session, which adjourned January 6th, 1873.

To settle the dispute as to the construction of the State Constitution, a suit became necessary to oust Kennard.

As the date of Morgan's appointment and confirmation, "to wit:" January 4th, 1873, (R. pp. 4–5,) the only existing law, under which he could have proceeded to test this question, was what was known as the "Intrusion into office act," No. 156 of the acts of 1868, appoved, October 15th, 1868. See Acts Louisiana, 1868, p. 199.

This act provided:

Sec. 1—"That an action by *petition* may be brought before the proper District Court, or Parish Court, by the District Attorney, or District Attorney pro tempore, and for the parish of Orleans, by the Attorney General or any other person interested in the name of the State, upon his own information, or upon the information of any private party, against the party or parties offending in the following cases."

First. "When any person shall usurp, intrude into, or unlawfully hold or exercise any public office or franchise within the State" * * * * * *.

Sec. 3. "That *service* shall be made in such cases, as are provided for in the foregoing sections, the *same as in civil suits*;" such cases to be tried by preference over all other cases, without being fixed for trial after issue joined * * * * * * *

This statute had previously been thought swift enough,

but here was an emergency. Even using all possible speed under its provisions, Morgan could not reach the coveted seat much before Kennard's commission would expire by constitutional limitation, "to wit:" with the expiration of the regular session, of the Senate, to wit: March 1st, 1873.

The needed remedy was provided by act No. 11. approved, January 15th, 1873, nine days after Morgan's confirmation, and after a suit had been filed, January 13, 1873, under the Intrusion Act, and discontinued, as *too slow*, January 18th, 1873.

The whole Act is hereto appended.

No. 11. "An act to regulate proceedings in contestations, between persons claiming a judicial office."

Section 1. Be it enacted by the Senate and House of Representatives of the State of Louisiana, in general assembly convened. That in any case in which a person may have been appointed to the office of judge of any Court in this State, and shall have been confirmed by the Senate and commissioned thereto, or shall have been elected, and in pursuance of such election, shall have been commissioned, such commission shall be *prima facie* proofs of the right of such persons to *immediately* hold and exercise such office.

Sec. 2. Be it further enacted, etc., That if any person, being an incumbent of such office shall refuse to vacate the same, and turn the same over to the person so commissioned, such person so commissioned shall have the right to proceed *by rule* before the Court of competent

jurisdiction, to have himself declared to be entitled to such office, and to be inducted therein, such rule shall be taken *contradictorily* with such incumbent, and shall be made returnable within twenty-four hours, and shall be tried immediately *without jury*, and by preference over all matters or causes depending in such Court, or that may be brought in such Court, and the judgment thereon, shall be signed the same day of rendition.

Sec. 3. Be it further enacted, etc., That either party to such rule, may take an appeal from the judgment thereon, but, such appeal shall be applied for, within *one* legal day from the rendition of the judgment on such rule, and shall be made returnable to the Supreme Court within two *days*. The appeal shall be taken up by the Supreme Court, by preference over all other cases, *immediately* on the application of either party, and the judgment thereon shall become final after the expiration of *one legal day, whether judicial or not.*

Sec. 4. Be it further enacted, etc., That all laws, or parts of laws conflicting with this act, shall be, and are hereby repealed, so far as they conflict with this act; and this act shall take effect, from and after its passage.

(Signed,) CHARLES LOWELL,
Speaker of the House of Representatives.

(Signed) C. C. ANTOINE,
Liet. Gov. and Pres't of the Senate.

Approved, January 15th, 1873.

(Signed) WILLIAM P. KELLOGG,
Governor of the State of Louisiana.

A true copy.

P. G. DESLONDE, Sec'y of State.

The sole error which plaintiff in error asks this Court to correct, is that portion of the decree of the Court, a qua, (R. p. 39) in which Chief Justice Ludeling says:

"The exception (R. p. 2) that the law of January 13, 1873, (the above quoted law,) violates section *one* of article fourteen, of the Constitution of the United States, is utterly without foundation. It merely provides a more *speedy* remedy for the settlement of contests for judicial offices. It is based upon sound considerations of public policy."

The first article of the Fourteenth Amendment of the Constitution of the United States, provides that, "No *State* shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State, deprive any person of life, liberty or property, *without due process of law.*"

The sole question then is, whether the State of Louisiana, acting under this law, through her judiciary, has deprived Kennard of his office without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

We are not aware that this Court has passed upon the meaning of "due process of law," as contained in the Fourteenth Amendment, but, can discover no difference in the meaning of the phrase, from that which has been by frequent adjudications given to the same expression in the Fifth Amendment, except that the former applies to States, whilst the latter is confined to the United States.

We are therefore at liberty to seek for the true definition, in the judgments of this, and other Courts of this and foreign countries.

The term as used in the Constitution doubtless had a fixed meaning. It was borrowed from our English ancestry, where it imported a course of legal proceeding free from *undue haste*, the law having always in all countries cherished the maxim "*festina lente.*"

Time for calm deliberation has ever been essential to the blind goddess, in holding the scales of justice on an even balance.

What then is "Due process of law?"

Citation in all systems of law known to modern civilization has ever been regarded as a prerequisite to bringing the defendant into Court.

At p. 1 R., will be found the following exception:

"And now comes John H. Kennard and excepts that there has been no citation *issued* herein or *served* on him in this case, and prays to be hence dismissed with costs."

Another exception appears on same page as filed the same day.

At p. 2 R., same day, (showing the electric speed of the Court,) appears the following entry:

"Exception overruled."

Minutes January 18th, 1873, R. p. 2. January 20th, 1873, an answer containing a prayer for jury was filed; the prayer for jury overruled "instanter" and the trial of cause proceeded same day (R. p. 3).

Justice Wyly, (R. p. 46,) in his dissenting opinion, says:

"I find from the record that there was *no citation, service* of citation or anything equivalent thereto, and *that the defendant was not served even with a copy of the rule upon which this action is based.* His exception on this ground was undoubtedly well taken."

Citation or some notice equivalent thereto is the foundation of the action, and a proceeding without it is *utterly void* unless the defendant *waives it* and *voluntarily enters an appearance.* C. Practice La., Art. 206.

So far from waiving anything or voluntarily entering an appearance, the defendant in this case filed his formal exception. (R. p. 1.)

The utter nullity of all the proceedings without citation is so patent that argument would be an insult to the intelligence of the Court.

If this be "due process of law," executions of judgments can *precede trials* without conflicting with the Constitution.

But suppose citation had been regular, is there not enough in the conduct of this case to justify any court in striking with nullity this lightning statute, as making a mockery of a fair trial and depriving defendant of everything like "due process of law."

A bare recital of the various acts in this farce of a trial must arrest the attention of your Honors, and convince you that however slow the people of Louisiana may be in many things, in law making, law expounding, and law executing, they are foremost among the peoples of the earth !

Morgan was appointed and confirmed January 4th, 1873. (R. p. 4 and 5.) He promptly filed his suit under the Intrusion Act, January 13th, 1873, and found it too slow. The new law authorizing this proceeding by rule was speedily put through both House and Senate and received the Governor's signature January 15th, 1873. (R. p. 14.) The rule framed under the law was filed next day, January 16th, (R. p. 1,) before it was promulgated; it was made to take effect from and after its passage. (R. p. 14.)

Two exceptions and answer (exceptions being overruled on the spot,) were filed January 18th, two days after filing of rule. (R. pp. 1, 2, 3.)

January 20th, 1873, (R. p. 3,) the trial proceeded. The same day judgment was rendered without reasons—except that "the law and the evidence being in favor of relator, Philip Hickey Morgan, and against the defendant, John H. Kennard, It is ordered, adjudged and decreed, that the said John H. Kennard be decreed and adjudged to be unlawfully holding and exercising the duties of said office of Associate Justice of the Supreme Court of the State of Louisiana, and that the said Philip Hickey Morgan be decreed and adjudged to be entitled to the said office of Associate Justice of the Supreme Court of the State of Louisiana." (R. p. 17.)

This judgment was rendered and signed the *same* day, January 20th, 1873. (R. p. 17.)

Motion for appeal, and order of appeal made the *same* day, (R. p. 18,)—returnable to the Supreme Court in *two* days.

On the 24th day of January, 1873, a motion to fix the case for trial in the Supreme Court was made and granted. (R. p. 35.)

The trial was set for the 27th. (R. p. 35.)

January 30th, 1873, the Court rendered their opinion. (R. p. 36.)

Just fifteen days from the date of the approval of the law (R. p. 14,) Morgan plucked its ripe fruits in his judgment. (R. p. 36.)

Chief Justice Ludeling, the organ of the majority of the Court, (R. p. 39,) in his opinion, says:

"The exception that the law of January 13th, 1873, violates section one of Art. 14th of the Constitution of the United States is utterly without foundation. It merely provides a *more speedy remedy* (the italics are ours) for the settlement of contests for judicial offices. It is based upon *sound* considerations of *public policy*."

We respectfully submit that there can be no sounder consideration of public policy than the preservation in their integrity, of the Constitution, the laws of the land, and the *modes* of their execution, all of which have received a rude shock from this unprecedented haste and disregard of the oldest maxims and precedents of the law.

The term "due process of law" is not defined with such accuracy in the adjudged cases as to prevent the possibility of mistake.

Judge Cooley says: "No definition perhaps is more often quoted than that by Mr. Webster in the Dartmouth College case.

"By the law of the land is most clearly intended the general law, which hears *before* it condemns, which proceeds upon *inquiry* and renders judgment only *after* trial. The meaning is that every citizen shall hold his life, liberty and property, and immunities under the protection of *general* rules which govern society. *Everything which may pass under the form of an enactment is not the law of the land.*"

Cooley's Constitutional Limitations, ed. 1868, pp. 353-4.

Mr. Justice Edwards (12 N. Y. 209 Westervelt vs. Gregg) says:

"Due process of law undoubtedly means in the due course of legal proceedings according to those rules and forms which *have been established* for the protection of private rights."

In Bank of Columbia vs. Oakley, 4 Wheat. 235, Mr. Justice Johnson says:

"As to the words from Magna Charta incorporated in the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this, that they were intended to secure the individual from the *arbitrary exercise of the powers of the government*, unrestrained by the established principles of private rights and distributive justice."

Ludeling, Chief Justice, (R. p. 39,) says:

"The maintenance of the rights of persons and property, the preservation of the public peace, security and order, depend npon the *prompt, certain and uninterrupted* admin-

istration of law. In order to secure such an administration of the law, it is essential that those who exercise power should be clothed with unchallenged authority. For this purpose no doubt, the Legislature of Louisiana passed the law providing for a speedy trial and settlement of conflicting claims of persons to judicial offices."

He cites as judicial authority for the speed of this law, the cases of

Borgstede vs. Clarke, 5 An. 733;

Rice vs. Dubuys, 5 An. 398;

in which the Supreme Court of Louisiana, held the act of the Legislature of Louisiana, No. 138, approved June 1st, 1846, to be constitutional, (Acts Louisiana, 1846–7, pages 116, 117, 118.) A reference to this act shows that the only summary feature in it, is the provision contained in section 5. "That the judgment rendered upon the first finding of the jury shall be *final*, and on certifying the same to the Governor, a commission shall be issued by him in favor of the person in whose favor the verdict may be."

Sec. 4. Allows the usual delay of ten days for filing answer.

Sec. 3. Provides for filing a petition in the usual way.

Sec. 2. Contains liberal provisions, as to time granted for taking testimony.

The reference to these decisions and this law by the Chief Justice is not felicitious, and yet these are the only Louisiana decisions, upon which he relies on this branch of the case.

The law in question (Act 15th January. 1873,) as stated by Justice Wyly dissenting, does not dispense with the law requiring citation or notice; on the contrary, it declares that "such rule shall be taken *contradictorily* with such incumbent, and shall be made returnable within twenty-four hours, and shall be tried immediately without a jury." (R. p. 46.)

That summary proceedings are authorized under the laws of Louisiana in sundry cases by express statute, we do not dispute; but that any judicial proceedings can be had without citation or its equivalent, we do deny, and challenge the production of an authority to the contrary.

We admit the plenary power of the Legislature to modify remedies, but upon abundant authorities of Louisiana's Courts, and the Supreme Court of the United States, maintain that a law which so operates upon an existing remedy, as to deprive litigants of substantial rights, is equally unconstitutional with a law operating directly upon the right.

Appreciating the force of the non-citation defence, Howell, Associate Justice, concurring with the majority of the Court, says:

"No question is raised as to notice of the rule, service of which was made on defendant, *else he would not have been in Court.*"

Reference to Record, page 1, will show that the first exception, filed January 18th, 1873, was in these words:

"And now comes John H. Kennard and excepts, that there has been *no citation issued herein, or served on him in this case, and prays to be hence* dismissed with costs."

If in this exception there is "no question raised as to notice of the rule," we fail to appreciate the force of language.

To say that an after appearance in filing answer, etc., reserving exceptions, cured the defects complained of in exception, is to affirm the futility of all exceptions *not sustained* by the Court "a qua."

VESTED RIGHT OF ACTION.

A vested *right of action* is property in the same sense, in which tangible things are property, and is *equally protected* against arbitrary interference. Is this not equally true of a vested right of defence?

Cooley on Constitutional Limitations, page 362.

7 Johns 477.

If the tribunal is without power to declare a State law, or a *State judicial proceedigs*, violative of that clause of the Amendment, which prohibits States from depriving persons of "due process of law," unless the State construction of such law or judicial proceeding, warrants such conclusion, the first article of the Fourteenth Amendment is an empty show of words.

The definitions of the term would be as numerous and variant as the States themselves.

Nothing can contribute more to the Republican institutions, than a new inculcation of old doctrines and definitions in the minds of new fledged law-makers and law expounders throughout the country.

Respectfully submitted,

THOS. J. SEMMES,
ROBERT MOTT,
HOSMER & CO.,
Of Counsel.

In the Supreme Court of the United States.

Oct. Term, 1875.

JOHN H. KENNARD,
PLAINTIFF IN ERROR,
v.
STATE OF LOUISIANA,
ex rel. &c., PHILIP HICKEY MORGAN.
No. 60.

Error to the Supreme Court of the State of Louisiana.

BRIEF FOR DEFENDANT IN ERROR.

P. H. Morgan and *J. H. Kennard* were contestants for the office of associate justice of the supreme court of Louisiana. In this suit, *Morgan*, by proceedings in the nature of a *quo warranto*, contests *Kennard's* right to the office, which, it is alleged, he is unlawfully holding and exercising, and prays to be decreed and adjudged entitled thereto. (C. P. of 1870, Art. 867, *et seq.*) Judgment was rendered in favor of *Morgan* by the court of original jurisdiction, (Rec., p. 17,) and *Kennard* appealed to the supreme court of the State of Louisiana, where the judgment of the lower court was affirmed. Being still dissatisfied, *Kennard* has prosecuted the present writ of error under U. S. R. S., article 709. *Kennard* was appointed December 3, 1872, during a recess of the senate, (in place of a judge resigned,) under article 61, constitution of Louisiana. *Morgan* was

appointed January 4, 1873, confirmed the same day, qualified on the 13th, and brought this suit on 16th of same month and year, under the summary proceedings provided by a particular statute for such cases, entitled "An act to "regulate proceedings in controversies between persons "claiming a judicial office." It is printed on p. 13 of Record, and p. 4 of plaintiff in error's brief.

The assignment of error is that the State of Louisiana, acting under this law through her judiciary, has deprived Kennard of his office without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

The specifications under that assignment of error are—

1. Want of citation, and the summary nature of the proceedings.

2. That the particular statute so operates upon remedy as to deprive *Kennard* of substantial rights, and is equally unconstitutional as a law operating directly upon the right.

3. The particular statute deprives Kennard of a vested right of defence.

On the merits of this case we submit that—

First. The proceeding by rule is in all respects DUE PROCESS OF LAW, in *quo warranto*, or any suits like this. Indeed, a rule in the course of a judicial proceeding, taken upon a third party, is due process of law. It brings the party into court, *if he chooses to come;* and in a contest for office, the jurisdiction, *ratione personæ*, is waived by an appearance, though all exceptions to the mode of proceedings be reserved. (Jones *v.* Andrews, 10 Wall., 327.) In suits of this nature the contest must necessarily be sum-

mary, otherwise there would be not only a suspension, but a denial of justice. The proceedings are not as *matter of right*, but as matter of REMEDY; they are *statutory* AND *special*, and the *judgments therein execute themselves.*

Railroad *v.* Clarke Nat. Bank, 60 Barbour, 234.

Second. Kennard's right to a trial by jury has no foundation in law. But the plaintiff in error has taken no exception to the ruling of the court, and makes no point of this in his brief.

Third. Nor is the statute retroactive; nor does it divest Kennard of any right or any defence; nor does it affect the merits of the case in any way. It is called "*a lightning statute*," because the proceedings under it are so summary. Yet summary proceedings are included in all systems of jurisprudence, and are specially applicable to proceedings in the nature of a *quo warranto*. (See 3 Stephens, N. P., page 2460.) A rule to show cause why the information should not be filed against him is the very first order of the court.

Ibid, 2460.

The proceedings in *quo warranto* under Louisiana Code of Practice have always been summary. (See Articles, C. P. of 1870, 754 *et seq.*, 867 *et seq.*) Article 868 provides for special laws to meet such cases as the present. And the special law for this case has been already alluded to.

Fourth. Nor has there been any denial of justice. The issue joined is clear, concise, definite. It has been decided by the superior and supreme court of Louisiana against *Kennard.* No objection is made to the substance of the proceedings, but merely to their form and the rapidity of

their movement. In a contest for a judicial office, neither of these objections should be sustained. The same necessity for prompt and speedy justice in regard to a criminal applies *a fortiori* to the trial of a contest for a judicial office, before whose incumbent the criminal may have to be tried. The rapidity of movement is in no wise censurable in either case. It is quite a remarkable fact that Kennard never applied for time to prepare his defence. Had such an application been made and denied, and exceptions reserved, some apparent ground might appear for his complaint.

Fifth. Before this statute of Louisiana is declared unconstitutional, your honors must see that it violates the constitution *clearly, palpably, plainly,* and in such manner as to *leave no doubt or hesitation in your minds.*

See Patterson *v.* Barlow, 60 Pa., 79, and cases cited.

AS TO THE JURISDICTION.

But if Murdock *v.* Memphis, (20 Wallace, 590,) enunciates correctly the present practice of this court under R. S., 709, a doubt at once arises as to THE JURISDICTION over this question, which doubt MUST be removed before the merits of the case can be investigated. "When the court "comes to consider the case it may be limited by the na- "ture of the writ; but what it shall review, and what it "shall not, must depend upon the jurisdiction of the court "in that class of cases, as fixed by the law governing that "jurisdiction."

We can only briefly suggest points without elaborating them; for our opinion is that "very many cases are brought "here now" where the plea is "a mere device to get the "case into this court," and that there are also cases where,

the moment "the Federal question is stated by counsel," your honors "all know there is nothing in it," *and that this is such a case.*

First. There is no question or case, here, embraced in R. S., 709.

Because—

(*a.*) The Art. 709 has no mention of or allusion to the clause of the XIV amendment to the Constitution, on which plaintiff in error relies; and no Congressional legislation has carried this constitutional provision into operation, or provided the means for the exercise of your appellate jurisdiction herein.

(*b.*) The judicial power of the United States does not extend to such a case as this.

(*c.*) The whole subject-matter of the suit is within the control of the sovereignty of the State of Louisiana, as limited by the Federal Constitution. The reasons set forth in the Collector *v.* Day, (11 Wallace, 123,) for denying the right in the United States to tax the salary of a State judge, seem to us perfectly conclusive on this point.

(*d.*) The suit does not touch upon any of the privileges and immunities of Kennard regarded as a citizen of the United States; but exclusively upon the privileges and immunities of Kennard as a citizen of Louisiana.

The Slaughter-house cases, 16 Wall., 36.

(*e.*) The executive of Louisiana appointed Morgan; her legislature confirmed him; her judiciary decreed him associate justice of the supreme court of Louisiana. The State is the real defendant in error here, and the proceedings are actually in her name, and conducted by her attorney-general in his official capacity.

A fortiori, if the case be regarded as a contested election case between citizens of the same State.

(*f.*) Rev. Stats., article 563, 629, 2010 are legal provisions to recover possession of office under the recent constitutional amendments. These articles do not confer any appellate jurisdiction upon your honors in the present case. But admit, *a. g.*, you have it, all this legislation excludes the idea that such a case as this was ever intended to be embraced in it. *Inclusio unius, exclusio alterius.* "It is not to be presumed that Congress, with a full knowledge of the history and traditions of the court, intended "to confer jurisdiction over the State tribunals upon any "question [case] where their decisions had been theretofore regarded as conclusive—a jurisdiction demanded "by no public necessity, and productive of no good "results."

Murdoch *v.* Memphis, 20 Wall., 611.

Second. But if there really was a question or case under R. S. 709, we have shown herein at great length that it was rightly decided by the court below, and that its judgment should be affirmed.

(*a.*) We therefore pray your honors to dismiss this writ of error, or affirm the judgment of the lower court.

Respectfully submitted.

DURANT & HORNOR,
Att'ys for Deft. in Error.

WASHINGTON, D. C., *September* 7, 1875.